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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 821 41

PYRAMID MOTOR FREIGHT CORPORATION,
PETITIONER,

vs.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 7, 1946.

CERTIORARI GRANTED MARCH 25, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket # 19-908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON, Plaintiffs-Appellants,

against

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

STATEMENT UNDER RULE 13

This is an appeal to the United States Circuit Court of Appeals, Second Circuit, from an order of the United States District Court for the Southern District of New York, bearing date the 14th day of February, 1945, and filed in the office of the clerk of the said court on the 19th day of February, 1945, dismissing the complaint herein.

The action which is one to recover from the respondent unpaid overtime wages pursuant to the provisions of the Fair Labor Standards Act of 1938, was commenced in the City Court of the City of New York, County of New York, by the service of a summons and verified complaint (Document # 2) upon the respondent on the 19th day of November, 1942. The respondent thereafter caused the said action to be removed from the said City Court to the United States District Court for the Southern District of New York and the said complaint and the respondent's answer were thereafter filed in the said District Court on the 21st and 31st days of December 1942 respect*fully*.

[fol. 2] All of the appellants except Sam Lanorith and Joseph Gannon were made original party plaintiffs in the said action and by an order (Document 7), dated and filed on the 20th day of April, 1943, they were added as party plaintiffs.

Leon E. Spielvogel, Esq., of 401 Broadway, New York City, appeared as the attorney of the plaintiff-appellants and Charles E. Cotterill, Esq., of 70 East 45th Street, New York City, appeared as the attorney for the defendant respondent.

After the action was removed to the District Court, and on the 16th day of April, 1943, the attorneys for the parties filed with the said court a stipulation dated April 15th, 1943, (Document 6) which amended the complaint by changing certain dates mentioned therein as well as certain sums of money referred to as representing the amount of overtime compensation due and owing from the respondent to the appellants.

On April 20th, 1943, the action regularly came on for trial before Hon. James Alger Fee, a visiting judge from the District of Oregon and in order to carry out either his direction or request that an agreed statement of fact be prepared and submitted in lieu of a trial, same was thereupon adjourned to the 3rd day of May, 1943. On the adjourned date of the trial the attorneys again appeared before the court and by their written stipulation and consent dated April 29th, 1943, submitted to Judge Fee for signature an order which framed all of the issues raised by the pleadings and provided that in lieu of a trial of the said action, that the matter be submitted to the court for its final determination upon an agreed statement of facts contained and set forth at great length in the said order.

Due probably to an oversight on the part of the court, the said order (Document # 8) was never signed and remained unfiled until the 19th day of February, 1945, but it was re- [fol. 3] ceived and accepted by Judge Fee on the said 3rd day of May, 1943, in lieu of a trial and used by him in arriving at the decision which he set forth in an opinion (Document # 9) dated November 29th, 1943, and filed on December 20th, 1943.

The decision made no disposition whatever of the cause, but on the contrary, left it in a state of uncertainty pending certain further proceedings on the part of the appellants.

The proceedings suggested by the said opinion were not undertaken by the appellants and nothing further was done in the matter until June 1944, at which time, Ramey & McKelvey, Esqs., of 501 Fifth Avenue, New York City, who were then retained of counsel to the appellants, wrote several letters to Judge Fee with a view toward obtaining a rehearing in the matter, or in the alternative, causing the opinion to be withdrawn and the cause resubmitted to the District Court on the pleadings and the agreed statement of facts above referred to. Judge Fee refused to act upon this request (Document # 16 filed October, 1944), where-

upon the appellants moved the District Court for a final disposition of the action. This motion (Document #10 filed February 19, 1945) regularly came on for hearing on the 28th day of November, 1944, and was thereupon referred to Judge Fee, who, under date of January 12th, 1945, rendered a decision (Document # 17 filed January 18th, 1945) upon which the order herein appealed from was entered.

The appellants' notice of appeal (Document # 19) was filed on the 2nd day of April, 1945.

The defendant-respondent was not arrested, neither was any bail taken nor property attached. No question of law or fact was referred to any commissioner, master or referee, and there has been no change of either parties or attorneys except as hereinbefore mentioned and set forth.

[fol. 4] IN CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, and LOUIS H. SHAPIRO, Plaintiffs,

against

PYRAMID MOTOR FREIGHT CORP., Defendant

COMPLAINT

Plaintiffs, complaining of the defendant by Leon E. Spielvogel, Esq., their attorney, respectfully show to this Court and allege:

For a First Cause of Action by Murray Ispass:

First: Plaintiff brings this action to recover from defendant unpaid minimum wages and unpaid overtime compensation and an additional equal amount as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

Second: Jurisdiction is conferred on this Court by Section 16(b) of the Act. The Act has been in effect since October 24th, 1938.

Third: Upon information and belief, defendant is a corporation organized and existing under and by virtue of the

laws of the State of New York and at all times hereinafter mentioned was engaged in the transportation of goods, [fol. 5] wares and merchandise in interstate commerce. Substantially all of the goods transported by defendant during the times hereinafter mentioned have been produced for interstate commerce, and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from the defendant's plant and place of business at 323 West 38th Street, New York City and from other points to various points outside the State of New York.

Fourth: During the workweeks beginning October 24th, 1938, and continuing to the present time, defendant has employed approximately sixty individuals in the preparation for, and in transportation of goods, wares and merchandise in interstate commerce. The goods carried by these employees during this period have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from defendant's place of business, as aforesaid, to points outside the State of New York.

Fifth: Plaintiff in his capacity as delivery clerk and "push-boy" was required to perform, and in fact performed, the following tasks, which were part of plaintiff's regular duties throughout the period of his employment:

(a) Transported goods from sources in New York City by hand truck for delivery to their customers, or to defendant's place of business for shipment in interstate commerce.

(b) Delivered by hand truck goods received from both without and within the State of New York and produced as aforesaid from defendant's place of busi- [fol. 6] ness to wholesalers and retailers, and from wholesalers and retailers to defendant's customers.

(c) Sorted goods, produced as aforesaid, at defendant's place of business.

(d) Assisted in the loading and unloading of goods produced as aforesaid, on and from defendant's trucks.

Sixth: These foregoing functions performed by plaintiff are an essential part of the transportation of said goods,

wares and merchandise and are operations necessary to the completion of transportation of such goods. Prior and subsequent to the work which plaintiff performed, a substantial portion of the goods were sold, transported, shipped and delivered in interstate commerce to various points outside the State of New York. Plaintiff's duties constituted the production of goods for commerce within the meaning of the Act, and constituted an essential part of the interstate transportation thereof.

Seventh: That at all times hereinafter mentioned, defendant employed plaintiff in the transportation of goods in interstate commerce, as aforesaid, for workweeks longer than the applicable maximum number of hours prevailing under Section 7 of the Act, and failed and refused to compensate him for such employment in excess of such applicable maximum in such workweeks, at rates not less than one and one-half times the regular rates at which he was employed. The employment of the plaintiff for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act, without compensating him for such excess hours at rates not less than one and one-half times the regu-
[fol. 7] lar rates at which he was employed, was in violation of Section 7 of the Act.

Eighth: During the period between March 15th, 1940, and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Ninth: During the period from March 15th, 1940, to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ ($.33⅓) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ ($.33⅓) Cents per hour, or at a rate of Fifty ($.50) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ ($.16⅔) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of Ninety ($90.00) Dollars for the said period.

Tenth: During the period from October 28th, 1940, to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per weeks or the equivalent of Thirty-eight and 2/10 ($.38 2/10) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of [fol. 8] forty (40) hours per week, at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and two-tenths (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) Dollars for the said period.

Eleventh: During the period from January 24th, 1941, to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Twelfth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Murray Ispass, the sum of Two Hundred Thirty-eight and 46/100 ($238.46) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

[fol. 9] For a Second Cause of Action by Max Granofsky:

Thirteenth: Plaintiff, Max Granofsky, repeats, reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Seventh"

of the first cause of action with the same force and effect as if fully set forth at length herein.

Fourteenth: During the period between August 2nd, 1939 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Fifteenth: During the period from August 2nd, 1939 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty-two (62) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Twenty-eight and 71/100 ($28.71) Dollars for the said period.

Sixteenth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approxi-
[fol. 10] mately Sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ (33⅓¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ (33⅓¢) Cents per hour, or at a rate of Fifty (50¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ (16⅔¢) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of One Hundred and Fifty-six ($156.00) — for the said period.

Seventeenth: During the period from October 28th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid

wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) — for the said period.

Eighteenth: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in [fol. 11] its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Nineteenth: That by reason of the foregoing, there is now due and owing to the plaintiff, Max Granofsky, the sum of Three Hundred Thirty-three and 17/100 ($333.17) Dollars for unpaid overtime compensation, with interest thereon, no part of which has been paid although duly demanded.

Twentieth: That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Third Cause of Action by Harry Brownstein:

Twenty-first: Plaintiff, Harry Brownstein, repeats, reiterates, and re-alleges each and every allegation con-

tained in the paragraphs marked "First" through "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

[fol. 12] Twenty-second: During the period between January 24th, 1941 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy", as hereinafter described.

Twenty-third: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate of not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 Dollars for the said period.

Twenty-fourth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Harry Brownstein, the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

[fol. 13] For a Fourth Cause of Action by Max Berlinsky:

Twenty-fifth: Plaintiff, Max Berlinsky, repeats, reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

Twenty-sixth: During the period between September 24th, 1939 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Twenty-seventh: During the period from September 24th, 1939 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty-two (62) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Thirty-one and 32/100 ($31.32) Dollars for the said period.

Twenty-eighth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for [fol. 14] approximately Sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ (33⅓) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ (33⅓) Cents per hour, or at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and one-third (33⅓¢) Cents per hour, or at a rate of Fifty (50¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ (16⅔) Cents for each hour worked in excess of Forty-two (42) hours in each workweek, or the sum of One Hundred Fifty-six ($156.00) Dollars for the said period.

Twenty-ninth: During the period from October 26th 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for

approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) Dollars for the said period.

[fol. 15] Thirtieth: During the period from January 24th, 1941 to September 20th, 1941 defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Thirty-first: a. That by reason of the foregoing, there is now due and owing to the plaintiff, Max Berlinsky, the sum of Three Hundred Thirty-five and 74/100 ($335.74) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

b. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Fifth Cause of Action by Carroll Mackler:

Thirty-second: Plaintiff, Carroll Mackler, repeats, reiterates, and re-alleges each and every allegation contained in

the paragraphs marked "First" through "Seventh" of the [fol. 16] first cause of action with the same force and effect as if fully set forth at length herein.

Thirty-third: During the period between October 24th, 1938 to September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Thirty-fourth: During the period from October 24th, 1938 to January 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Sixteen ($16.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of forty-four (44) hours in each workweek or the sum of Twenty and 74/100 ($20.74) Dollars.

Thirty-fifth: During the period from January 24th, 1939 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Thirty-two and 7/10 (32.7¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of [fol. 17] Forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-two and 7/10 (32.7¢) Cents per hour, or at a rate of Forty-nine (49) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and 3/10 (16.3¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Sixty-nine and 93/100 ($69.93) Dollars for the said period.

Thirty-sixth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approxi-

mately Fifty-five (55) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-six and 4/10 (36.4¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-six and 4/10 (36.4¢) Cents per hour, or at a rate of Fifty-four and 6/10 (54.6¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Eighteen and 2/10 (18.2¢) Cents for each hour in excess of forty-two (42) in each workweek, or the sum of One Hundred Twenty-three and 3/100 ($123.03) Dollars for the said period.

Thirty-seventh: During the period from October 24th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was [fol. 18] required to compensate plaintiff for each hour of work in excess of forty (40) per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of forty (40) in each workweek or the sum of Thirty-seven and 23/100 ($37.28) Dollars for the said period.

Thirty-eight: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of

forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Thirty-ninth: a. That by reason of the foregoing, there is now due and owing to the plaintiff, Carroll Mackler, the sum of Three Hundred Sixty-two and 16/100 ($362.16) Dollars for unpaid overtime compensation, with interest [fol. 19] thereon; no part of which has been paid although duly demanded.

b. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Sixth Cause of Action by Louis A. Shapiro:

Fortieth: Plaintiff, Louis H. Shapiro, repeats and reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Fourth" of the first cause of action with the same force and effect as if fully set forth at length herein.

Forty-first: Plaintiff in his capacity as delivery clerk and "push-boy" was required to perform, and in fact performed, the following tasks, which were part of plaintiff's regular duties throughout the period of his employment.

(a) Transported goods from sources in New York City by hand truck for delivery to their customers, or to defendant's place of business for shipment in interstate commerce.

(b) Delivered by hand truck goods received from both without and within the State of New York and produced as aforesaid from defendant's place of business to wholesalers and retailers, and from wholesalers and retailers to defendant's customers.

(c) Sorted goods, produced as aforesaid, at defendant's place of business.

[fol. 20] (d) Assisted in the loading and unloading of goods produced as aforesaid, on and from defendant's trucks.

(e) Watched defendant's trucks after regular drivers went home and until relief drivers appeared.

(f) Performed certain clerical duties, such as rating and manifesting the day's receipts.

Forty-second: Plaintiff repeats and reiterates paragraphs "Sixth" and "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

Forty-third: During the period between October 24th, 1938 and January 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy," as hereinabove described.

Forty-fourth: During the period from October 24th, 1938 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of forty (40¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty (40¢) Cents per hour, or at a rate of sixty (60¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of twenty (20¢) Cents for each hour worked in excess of forty-four (44) hours in each workweek or the sum of One Hundred and Sixty-six and 40/100 ($166.40) Dollars.

[fol. 21] Forty-fifth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business as aforesaid, for approximately sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty-seven ($27.00) Dollars per week or the equivalent of forty-five (45¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty-five (45¢) Cents per hour, or at a rate of sixty-seven and 5/10 (67.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-two and 5/10 (22.5¢) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of Two Hundred Ten and 60/100 ($210.60) Dollars for the said period.

Forty-sixth: During the period from October 26th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty-seven ($27.00) Dollars per week or the equivalent of forty-five (45¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty-five (45¢) Cents per hour, or at the rate of Sixty-seven and 5/10 (67.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-two and 5/10 (22.5¢) Cents for each hour worked in excess of forty (40) hours in each workweek or the sum of Fifty-eight and 50/100 ($58.50) Dollars for the said period.

[Vol. 22] Forty-seventh: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Thirty ($30.00) Dollars per week or the equivalent of fifty (50¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of fifty (50¢) Cents per hour, or at the rate of seventy-five (75¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of twenty-five (25¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of One Hundred and Seventy ($170.00) Dollars for the said period.

Forty-eighth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Louis H. Shapiro, the sum of Six Hundred and Five ($605.00) Dollars for unpaid overtime compensation, with interest thereon, no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

Wherefore, the plaintiffs pray that judgments be entered against the defendant, Pyramid Motor Freight Corp., and

in favor of plaintiff, Murray Ispass, in the amount of Two Hundred Thirty-eight and 46/100 ($238.46) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff, Max Granofsky, in the amount of Three Hundred Thirty-three [fol. 23] and 17/100 ($333.17) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff, Harry Brownstein in the amount of One Hundred Eleven and 8/100 ($111.08) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff Max Berlinsky, in the amount of Three Hundred Thirty-five and 74/100 ($335.74) Dollars for unpaid overtime compensation and for an additional equal amount as liquidated damages; in favor of plaintiff, Carroll Mackler, in the amount of Three Hundred Sixty-two and 16/100 ($362.16) Dollars for unpaid overtime compensation and for an additional equal amount as liquidated damages; in favor of plaintiff, Louis H. Shapiro, in the amount of Six Hundred Five and 50/100 ($605.50) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages, together with costs and disbursements, average interest from the 1st day of February, 1940, and that the Court allow a reasonable attorney's fee to be paid by the defendant.

Leon E. Spielvogel, Attorney for Plaintiffs, Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

Filed Dec: 21, 1942. U. S. Dist. Ct. S. D. N. Y.

[fol. 24] In United States District Court, Southern District of New York

Civil Action No. 20-145

Answer

Defendant, Pyramid Motor Freight Corporation, by its attorney, Charles E. Cotterill, Esq., for answer to the petition herein respectfully shows:

As to the First Alleged Cause of Action:

The allegations of paragraphs first, second, third, and fourth are admitted except that it says the number of its

employees described in paragraph fourth considerably exceeded sixty individuals.

The allegations of paragraphs fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth are denied.

As to the Second Alleged Cause of Action:

As to the second alleged cause of action for answer to paragraph thirteenth the defendant says that insofar as it reiterates and realleges the allegations of paragraphs first, second, third, and fourth such allegations are admitted but those with respect to paragraphs fifth, sixth, and seventh are denied.

The allegations of paragraphs fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth are denied.

[fol. 25] As to the Third Alleged Cause of Action:

In answering the allegations of paragraphs twenty-first the defendant says that insofar as it repeats, reiterates and realleges the allegations of paragraphs first, second, third, fourth, they are admitted but as to the reiterations and reallegations of paragraphs fifth, sixth, seventh, they are denied.

The allegations of paragraph- twenty-second, twenty-third, and twenty-fourth are denied.

As to the Fourth Alleged Cause of Action:

In answering the allegations of paragraph twenty-fifth, the defendant says that insofar as it reiterates and realleges the allegations contained in paragraphs first, second, third, and fourth they are admitted. But insofar as it reiterates and realleges the allegations of paragraphs fifth, sixth, and seventh they are denied.

The allegations of paragraphs twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, and thirty-first are denied.

As to the Fifth Alleged Cause of Action:

In answering the allegations of paragraph thirty-second the defendant says that insofar as it reiterates and realleges the allegations of paragraphs first, second, third, and fourth they are admitted. But insofar as it reiterates and re-

alleges the allegations of paragraphs fifth, sixth, and seventh they are denied.

The allegations of paragraphs thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth are denied.

[fol. 26] As to the Sixth Alleged Cause of Action:

The allegations of paragraph fortieth are admitted.

The allegations of paragraphs forty-first, forty-second, forty-third, forty-fourth, forty-fifth, forty-sixth, forty-seventh, and forty-eighth are denied.

For separate and special defense defendant says that at all times mentioned in the complaint the defendant was a common carrier of property for hire engaged almost wholly in the transportation of general freight commodities in interstate and foreign commerce; that the labor performed by each of the plaintiffs for and in behalf of the defendant consisted primarily of that of driver's helper and of loader; and that by virtue thereof such occupations were at all times mentioned in the complaint exempt from the provisions of the Fair Labor Standards Act of 1938.

Wherefore, it is respectfully prayed that the complaint be dismissed without costs to the defendant.

Charles E. Cotterill, Attorney for Defendant, P. O. Address: 70 East 45th Street, New York, N. Y.

Filed Dec. 31, 1942. U. S. Dist. Ct. S. D. N. Y.

[fol. 27] In United States District Court

[Title omitted]

Stipulation as to Amended Complaint

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the complaint in the above entitled action be amended in respect to the following allegations:

Paragraph "Ninth", second line, October 26, 1940, be amended and changed and to now read October 24, 1940.

Paragraph "Tenth," first line, October 28, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Fifteenth," second line, September 20, 1941, be amended and changed and to now read October 23, 1939. Paragraph "Sixteenth" first line, October 23, 1939 be amended and changed and to now read October 24, 1939. Paragraph "Sixteenth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Seventeenth," first line, October 28, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-second," first line, January 24, 1941, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-second," second line, September 20, 1941, be amended and changed and to now read September 1, 1941. Paragraph "Twenty-third," first line, January 24, 1941, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-third," second line, September 20, [fol. 28] 1941, be amended and changed and to now read September 1, 1941. Paragraph "Twenty-third," last line, $111.18 be amended and changed and to now read $144.80. Paragraph "Twenty-fourth A," third line, $111.18 be amended and changed and to now read $144.80. Paragraph "Twenty-eighth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-ninth," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Thirty-sixth," first line, October 23, 1939, be amended and changed and to now read October 24, 1939. Paragraph "Thirty-sixth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Thirty-seventh," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-fourth," second line, October 23, 1939 be amended and changed and to now read Octomer 24, 1939. Paragraph "Forty-fifth," first line, October 23, 1939, be amended and changed and to now read October 24, 1939. Paragraph "Forty-fifth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-sixth," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-eighth A," third line, $605.50. In the prayer for relief in respect to the amount demanded for

Harry Brownstein, 10th line, $111.08 be amended and changed and to now read $144.80.

Dated: New York City, April 15, 1943.

(Sgd.) Leon E. Spielvogel, Attorney for Plaintiffs.
Charles E. Cotterill, Attorney for Defendant.

Filed Apr. 16, 1943. U. S. Dist. Ct. S. D. N. Y.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ADDING PARTIES—April 20, 1943

Upon the annexed consent of the attorneys for the respective parties, and upon the waiver of notice of settlement of order, and upon motion of Leon E. Spielvogel, Esq., attorney for the plaintiffs, it is

Ordered that upon the trial of this action that Sam Lanorith and Joseph Gannon be added as parties plaintiffs, with the same force and effect as though they had been named in the original summons and complaint herein at the time of the commencement of this action, and it is further

Ordered that as and for a cause of action in behalf of the said plaintiff, Sam Lanorith, that all of the allegations contained in the "Second Cause of Action" set up in the original complaint in behalf of the plaintiff, Max Granofsky, be set forth at length as that of the plaintiff, Sam Lanorith, except as to the dates and figures set forth in said cause of action, and that as — this said plaintiff, Sam Lanorith, the said dates and figures substantially are as follows:

[fol. 30] A. That the period of employment was between September 25, 1939, and October 24, 1939. Defendant employed the said plaintiff for approximately 62 hours per week during this period. That he was paid $18.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 44 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

B. That the period of employment was between October 24, 1939, and September 1, 1940. Defendant employed the

said plaintiff for approximately 60 hours per week during this period. That he was paid $18.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 42 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

C. That the period of employment was between September 1, 1940, and October 24, 1940. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $21.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 44 hours per week, and therefore, plaintiff is entitled to 11 hours overtime during this period.

D. That the period of employment was between October 24, 1940, and January 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $21.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

E. That the period of employment was between January 1, 1941, and September 1, 1941. Defendant employed the [fol. 31] said plaintiff for approximately 55 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

That there is due and owing to the plaintiff, Sam Lanorith on his cause of action the sum of $288.93 for unpaid overtime compensation with interest thereon, and also pursuant to Section 16B of the act, this plaintiff is entitled to an additional equal amount as liquidated damages, and it is further

Ordered that as and for a cause of action in behalf of the said plaintiff, Joseph Gannon, that all of the allegations contained in the "Second Cause of Action" set up in the original complaint in behalf of the plaintiff, Max Granofsky, to be set forth at length as that of the plaintiff, Joseph Gannon, except as to the dates and figures set forth in said cause of action, and that as to this said plaintiff, Joseph Gannon, the said dates and figures substantially are as follows:

A. That the period of employment was between October 24, 1939, and October 24, 1940. Defendant employed the said plaintiff for approximately 60 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 42 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

B. That the period of employment was between October 26, 1940, and March 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime [fol. 32] was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

C. That the period of employment was between March 1, 1941, and September 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week, during this period. That he was paid $27.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

That there is due and owing to the plaintiff, Joseph Gannon on his cause of action the sum of $345.61 for unpaid overtime compensation with interest thereon, and also pursuant to Section 16B of the act, this plaintiff is entitled to an additional equal amount as liquidated damages.

That the answer of the defendant in respect to the causes of action in behalf of the plaintiffs, Sam Lanorith and Joseph Gannon, is substantially the same as set forth in respect to the cause of action of each of the original plaintiffs. The denials intending to set up the same issue in respect to these issues, is the same as the issues set up in respect to the cause of action of each of the original plaintiffs, and it is further.

Ordered that the names of Sam Lanorith and Joseph Gannon be added to the summons and complaint herein, and that the cause of action for each of these plaintiffs is substantially as hereinabove set forth, and that the testimony in the trial hereof be deemed offered in their behalf in addition to the other parties plaintiffs, and that the clerk

of this Court is hereby ordered to mark his records in this case accordingly.

James Alger Fee, U. S. D. J.

[fol. 33] STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the trial of this action, the foregoing proposed order may be presented for signature by the Justice presiding thereat, and that notice of settlement thereof is hereby waived.

Leon E. Spielvogel, Attorney for Plaintiffs; Chas. E. Cotterill, Attorney for Defendant.

Filed Apr. 20, 1943. U. S. Dist. Ct. S. D. N. Y.

[fol. 34] IN UNITED STATES DISTRICT COURT

ORDER RE ADMISSIONS

Upon reading and filing the annexed consent of the attorneys for the respective parties hereto, it is

Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I. That this is an action brought under, and by virtue of, the Fair Labor Standards Act, 1938, 29 U. S. C. A., sections 201-219.

II. The complaint contains six causes of action for wages alleged to be due plaintiffs from defendant. The complaint was subsequently amended by an order, based on a stipulation, to include the causes of action of two additional plaintiffs.

III. The defendant was engaged in "commerce", within the purview of section 3 of the Act.

IV. The plaintiffs were engaged in "commerce" or in the "production of goods for commerce" within the purview of section 3 of the Act.

V. The defendant did not pay the plaintiffs any overtime compensation.

[fol. 35] VI. The parties have entered into the following stipulation of facts which have been agreed to be the facts upon which this action is based:

"The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:

Item 1. The defendant is a common carrier of property for hire by a motor vehicle in interstate and foreign commerce. It operates approximately 190 motor vehicles. Its principal operations are those between Wilmington, Delaware, and Philadelphia on the South and New York City and the Metropolitan New York District on the North. It is so authorized to operate by the Interstate Commerce Commission under a certificate of public convenience and necessity. It is privileged to transport what are termed "commodities generally."

Item 2. The defendant's main terminal in New York City is on West 11th Street, Manhattan Island. For the purpose of better serving its numerous customers in what is known as the Garment Center of New York City, it has long maintained a sub-terminal at 323 West 38th Street at which northbound freight for delivery in the Garment Center has been brought and southbound freight originating in the Garment Center leaves.

Item 3. As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown helpers rode on the vehicles with the drivers to the 38th [fol. 36] Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. As the downtown helper pushed the freight packages over the tailboards they were received by the plaintiffs, who then placed the freight packages in the sub-terminal building. Still later in the mornings the plaintiffs then delivered the packages to various consignees in the Garment Center, generally using for that purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

During those same days other northbound trucks after first stopping at the West 11th Street main terminal to

change a driver and receive a downtown helper, by-passed the West 38th Street sub-terminal and parked first at one place and then another alongside the curbs in the Garment Center. At those places the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.

Item 4. In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was "picked up" for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: Some of the freight packages would be picked up by the plaintiffs at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and [fol. 37] then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs would also at the same time so load the vehicles.

Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs brought the packages by hand or by hand truck. The part which the plaintiffs took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

Item 5. As to all the plaintiffs other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal.

Item 6. For the purposes of this case and for this case only it is agreed that the work period of each plaintiff each week was 54 hours, except as to plaintiff Shapiro, whose work hours, it is agreed, was 58, in consideration of which each was employed at a fixed weekly wage.

It is further agreed that the foregoing constitutes a description of the entire duties of the plaintiffs."

[fol. 38] VII. The hours worked by the plaintiffs and their regular weekly compensation are as shown in Exhibits 1-8 inclusive.

VIII. It is agreed that if the plaintiffs are entitled to recover, a reasonable attorney's fee shall be fixed by the Court.

IX. It is agreed that if plaintiffs are entitled to recover for overtime claimed due, plaintiffs are also entitled to recover double said amount as liquidated damages, in accordance with Section 16 (b) of the Wage and Hour Act.

It is further ordered that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I. Plaintiffs contend that they are covered by the Fair Labor Standards Act of 1938, and particularly by section 7 (a) thereof.

II. Defendant contends that plaintiffs are not covered by the Act and are specifically exempt from the provisions of section 7 (a) by section 13 (b) (1) thereof.

This issue involves a mixed question of law and fact to be determined at the trial.

It is agreed by counsel for both parties and by the Court that the decisions of the Interstate Commerce Commission and the Interpretive Bulletins and other rulings of the Administrator under the Fair Labor Standards Act are not binding upon the Court, but shall be considered by the Court in the determination of the issues raised herein; the Court to give such rulings the consideration required of them by law.

[fol. 39] The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this —— day of ———, 1943.

—— —. ——, U. S. D. J.

Notice of settlement of foregoing order is hereby waived, and consent to signing same is hereby made.

Dated: April 29, 1943.

(S.) Leon E. Spielvogel, Attorney for Plaintiffs;

Charles E. Cotterill, Attorney for Defendant.

[fol. 40]

EXHIBIT No. 1

Murray Ispass

Period of Employment	Weekly Wage	Hours Per Week	Hours overtime	In Excess Of	Hourly Wage	Weeks in Period	Overtime Compensation due	Total
Aug. 1, 1940 to Sept. 1, 1940	$18	54	12	42	$.33⅓	4	$8.00	
Sept. 1, 1940 to Oct. 24, 1940	21	54	12	42	.388	8	18.62	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1940	24	54	14	40	.444	34	105.67	
								$159.45

EXHIBIT No. 2

Max Granofsky

Oct. 7, 1939 to Oct. 24, 1939	20	54	10	44	.37	2	3.70	
Oct. 24, 1939 to Sept. 1, 1940	20	54	12	42	.37	44	97.68	
Sept. 1, 1940 to Oct. 24, 1940	21	54	12	42	.388	8	18.62	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1941	24	54	14	40	.444	34	105.67	
								$252.83

[fol. 41]

EXHIBIT No. 3

Harry Brownstein

Period of Employment	Weekly Wage	Hours Per Week	Hours over-time	In Excess Of	Hourly Wage	Weeks in Period	Overtime Compensation due	Total
Oct. 12, 1940 to Oct. 24, 1940	21	54	12	42	.388	2	4.66	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1941	24	54	14	40	.444	34	105.67	
								$137.49

EXHIBIT No. 4

Max Berlinsky

Aug. 24, 1939 to Oct. 24, 1939	18	54	10	44	.33⅓	7	11.67	
Oct. 24, 1939 to Sept. 1, 1940	20	54	12	42	.37	44	97.68	
Sept. 1, 1940 to Oct. 24, 1940	21	54	12	42	.388	8	62	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1941	24	54	14	40	.444	34	105.67	
								$260.18

EXHIBIT No. 5

Carroll Mackler

Oct. 24, 1938 to Oct. 24, 1939	18	54	10	44	.33⅓	52	86.67	

[fol. 42]

Oct. 24, 1939 to Sept. 1, 1940	20	54	12	42	.37	44	97.68	
Sept. 1, 1940 to Oct. 24, 1940	21	54	12	42	.388	8	18.62	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1941	24	54	14	40	.444	34	105.67	
								$335.80

EXHIBIT No. 6

Louis H. Shapiro

Period of Employment	Weekly Wage	Hours Per Week	Hours over-time	In Excess Of	Hourly Wage	Weeks in Period	Overtime Compensation due	Total
Oct. 24, 1938 to Oct. 24, 1939	24	58	14	44	.414	52	160.70	
Oct. 24, 1939 to Jan. 1, 1940	24	58	16	42	.414	9	29.81	
Jan. 1, 1940 to Oct. 24, 1940	27	58	16	42	.466	42	156.58	
Oct. 24, 1940 to Jan. 1, 1941	27	58	18	40	.466	10	41.94	
Jan. 1, 1941 to Sept. 1, 1941	30	58	18	40	.518	34	158.51	
								$537.54

[fol. 43]

EXHIBIT No. 7

Sam Lanorith

Sept. 25, 1939 to Oct. 24, 1939	18	54	10	44	.33⅓	4	6.67	
Oct. 24, 1939 to Sept. 1, 1940	18	54	12	42	.33⅓	44	88.20	
Sept. 1, 1940 to Oct. 24, 1940	21	54	12	42	.388	8	18.62	
Oct. 24, 1940 to Jan. 1, 1941	21	54	14	40	.388	10	27.16	
Jan. 1, 1941 to Sept. 1, 1941	24	54	14	40	.444	34	105.67	
								$246.12

EXHIBIT No. 8

Joseph Gannon

Oct. 24, 1939 to Oct. 24, 1940	24	54	12	42	.444	52	148.53	
Oct. 24, 1940 to Mar. 1, 1941	24	54	14	40	.444	18	55.94	
Mar. 1, 1941 to	27	54	14	40	.50	26	91.00	
								$295.47

[fol. 44] Method of Computation

In each case, the weekly wage was divided by the number of hours per week to give the hourly wage. The number of hours overtime was then multiplied by half the hourly wage to give weekly overtime compensation due. This product was then multiplied by the number of weeks in the period to give this compensation due for the various work-periods.

Between October 24, 1938 and October 24, 1939 time worked in excess of 44 hours per week is considered "over-time."

Between October 24, 1939 and October 24, 1940, time worked in excess of 42 hours is considered "over-time."

After October 24, 1940, time worked in excess of 40 hours is considered overtime.

Example

Between January 1, 1941 and September 1, 1941, Sam Lanorith worked 54 hours per week and received a weekly wage of $24.00. Since time worked in excess of 40 hours during this period is considered "over-time," he worked 14 hours "over-time" during this period.

$24 divided by 45 hours = $.444 which represents the hourly wage.

14 hours overtime multiplied by ½ of $.444 ($.222) equals weekly overtime compensation due (time and *a half*) in this case, 14 × $.222 = $3.108.

This product multiplied by the number of weeks in the period between January 1, to September 1, 1941 (34 weeks), equals overtime compensation due for this period. In this case $3.108 × 34 = $105.67.

Filed Feb. 19, 1945. U. S. Dist. Ct. S. D. N. Y.

[fol. 45] In the District Court of the United States for the Southern District of New York

Civil Action No. 20-145

Opinion—November 29, 1943

The plaintiffs in this case are employees of defendant which is a common carrier for hire of freight by motor between various cities of the east coast in interstate com-

merce. Plaintiffs assisted in loading and unloading trucks of defendant from and on the sidewalks of the "garment center," and at and near the subterminal maintained by defendant at 38th Street in New York City. This action is brought under the provisions of the Fair Labor Standards Act, since plaintiffs claim they were not paid for overtime according to the rubric thereof.

The difficulty with the case at the outset lies in the fact that the defendant is under the jurisdiction of the Interstate Commerce Commission for most purposes. Unquestionably, that body also prima facie had the power to regulate in the first instance, at least, the maximum hours of the employees of defendant under §204(a) (1); 49 U. S. C. A. 304(a)-(1). But in the opinion of the Commission under the title "Jurisdiction over Employees of Motor Carriers", 13 M. C. C. 481, that body construing the statute in the light of the facts and guided by legislative policy, held that they had the "power" to regulate only the maximum hours of those employees whose activities directly affect the safety [fol. 46] of the operation of motor vehicles in interstate and foreign commerce. The Supreme Court of the United States, in a different proceeding, virtually affirmed the construction placed upon the Act by the Commission. United States v. American Trucking Associations, Inc., 310 U. S. 534, 543.

Where a governmental policy has been declared legislatively and the enforcement is committed to an administrative body so far as possible, the courts should permit that body to interpret the facts in the light of the policy in the first instance. The courts should not struggle for primary jurisdiction in such a field. Nor should primary enforcement of the policy be hindered by judicial interference, unnecessarily. No doubt the courts should retain the power of review of governmental action to prevent the expansion of the executive power unwarranted by statute. Particularly should this be true regarding jurisdictional questions and construction of the statute as to inclusion and exclusion of states of fact. But, at the outset, the determination should generally be made by the administrative body.

In the opinion above cited [1] the Commission, after stating

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[1] Jurisdiction over Employees of Motor Carriers, 13 M. C. C. 481, 488.

the test as above, said that drivers were certainly within the class over which power could be exercised, and proceeded as follows:

> "It may well be that the activities of some employees other than drivers likewise affect the safety *of operation of motor vehicles engaged in interstate and foreign commerce.* If common and contract carriers, or private carriers of property, or their employees believe that the activities of employees other than drivers affect [fol. 47] the safety of operation of motor vehicles engaged in interstate and foreign commerce, they may file an appropriate petition, asking that a hearing be held and the question determined."

This case involves the negative of that proposition. Here the employees are contending that they, although employed by such a carrier, are not within the jurisdiction of the Commission. But if the question of inclusion is one for the Commission, demonstrably the question of exclusion is for the Commission also. This process in either phase is not the textual construction of a statute, but the interpretation of a policy in the light of the facts, limited by the statute. The Commission has excluded certain employees but has included "helpers" and "loaders" at the terminals.

The plaintiffs, generally speaking, bring goods in carriers or push carts from the loft buildings of the garment center to the trucks and pass these to the persons who ride with the trucks and stow the goods therein, in the loading operation. On unloading, plaintiffs receive goods from such persons, place them in push carts or carriers and deliver these to loft buildings, where the garment makers are housed. Plaintiffs, with one exception, do not ride on the motor vehicles, but occasionally enter therein to assist either in unloading or loading. One of plaintiffs for some period of time, rode on a truck and assisted in loading and unloading for four or five hours a day as a part of his regular duty.

The Commission included "loaders" within their jurisdiction, saying in part,

> "'The large carriers, however, and particularly those who have important operations from terminal, employ men variously called loaders, dockmen, or helpers, and [fol. 48] hereinafter called loaders, whose sole duties

are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse."

"The evidence makes it entirely clear that a motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle that on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicles."[2]

The Commission included armed guards and conductorettes as employees essential to the safety of the operation of motor vehicles transporting property and persons in interstate and foreign commerce. There were three concurring opinions. One of these questioned the inclusion of conductorettes and guards. Two questioned inclusion of mechanics and loaders. The commission says:

"We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with [fol. 49] the degree in which they engage in such activities would create confusion and continual controversy. They will be included in the category of helpers."[3]

If such fine distinctions are not to be employed in dealing with those who ride upon the vehicle, why should the court hold such distinctions should be applied in dealing with "loaders" "in a law drawn to meet many needs of a major occupation."[4].

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[2] In the Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M. C. C. 125, 136.

[3] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra* 134.

[4] *United States* v. *American Trucking Association*, *supra*, 542-3.

The duties of "loaders" are so closely akin to the duties performed by plaintiffs, as above outlined, that it may well be contended that the Commission intended to exercise power over the class to which plaintiffs belong also. At least plaintiffs can only be excluded by drawing the fine distinctions which are denounced in the opinion above quoted. The question of whether the functions of plaintiffs affect the safety of operation is peculiarly a question of fact requiring technical knowledge for its solution.

The Commission also found "that no employees * * * other than drivers" and mechanics, loaders and helpers "perform duties which directly affect the safety of operation."[5] This might be construed as a direct exclusion by the Commission of office employees of the class of rate clerks. Therefore, the indicated solution is to allow the Commission to deal with the situation primarily subject to appropriate review by the courts.

[fol. 50] In *Missel* v. *Overnight Motor Transportation Co., Inc.*,[6] plaintiff, who was a rate clerk of a common carrier of freight in interstate commerce by motor vehicle, brought action under the Fair Labor Standards Act for overtime wages. It was held, on motion to dismiss, over the contention that primary jurisdiction to determine the question lay in the Commission, that the motion should be overruled. A rate clerk, obviously, has less direct connection with operation than a "dispatcher". The Commission found regarding a dispatcher that:

> "The dispatchers do no mechanical work on the motor vehicles, nor do they load or unload. They are not drivers, and they do not accompany the drivers while the motor vehicles are operated in interstate or foreign commerce."[6a]

Actually, the Commission had already determined that power over this class of employees did not exist.

In *West* v. *Smoky Mountains Stages, Inc.*,[7] the court independently came to the conclusion that the activities of

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[5] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra*, 139.

[6] 36 F. Supp. 980.

[6a] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra*, 135.

[7] 40 F. Supp. 296, 297.

a mechanic "did affect the safety of operation of the busses * * * being operated in interstate commerce", but as the opinion shows, the Commission had already concluded the controversy with respect to this class of employees.

In *Magann* v. *Long's Baggage Transfer Co., Inc.*,[8] the [fol. 51] court expressly refused to follow certain indicated findings of the Commission and the Wage and Hour Division of the Department of Labor, and finally arrives at the conclusion that a "driver" of trucks used exclusively for the transportation of the mails is entitled to recover under the scale of the Fair Labor Standards Act. Whatever this opinion means, it is not binding upon this court and will not be followed.

In Interpretative Bulletin No. 9, the administrative body charged with enforcement of the Fair Labor Standards Act, the Wage and Hour Division, United States Department of Labor, in a note says that

> "at least three courts have held that in suits under section 16(b), the courts may determine what employees lie within the Commissioner's power to prescribe hours of service and may reach decisions different from those reached by the Commission."[9]

But the Division recognizes that the Commission is endowed with the authority by the statute to fix these classes by inclusion and exclusion and that the Division has no such power, although great weight is accorded its interpretations. Still the Division acts in a broader field and is no expert in a specific field, as is the Commission.

For a single District Judge to attempt to determine the limits of power between administrative agencies in this stricken field of regulation would be to invite the charge of usurpation. Suffice it to say that Congress has given [fol. 52] the authority to the Commission. Whether the "power has been exercised or not is not the question. Any class of employees over which the Commission may exercise the power falls under the express language of the exemp-

[8] 39 F. Supp. 742, 743.

[9] Citing *Missel* v. *Overnight Motor Transportation Co., Inc., supra; West* v. *Smoky Mountains Stages, supra; Magann* v. *Long's Baggage Transfer Co., supra,* above referred to.

tion.[10] The Commission has expressly held that it has the "power" of regulation of the maximum hours of "loaders". If the plaintiffs fall within that classification, then the Commission has already ruled adversely to their contention and it does not lie in the hands of a court constituted such as this one, to correct them. If the Commission has not determined that the class of employees to which plaintiffs belong are "loaders," then they have not excluded plaintiffs from the exercise of jurisdiction, as yet. This court, then, is still without the benefit of a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly . . . ."[11]

If a court now attempts to deal with such a situation, the process must include the construction of the decision of the Commission, in the light of the facts. Congress has indicated that the courts are not primarily equipped to determine what employees affect the safety of such operations by their activities. Therefore, the Commission should say in an appropriate proceeding whether these employees under the peculiar situation fell within or without the classification of "loaders" already established by them, before the court should grant a recovery. Of course, if the Commission decides this question erroneously, there may [fol. 53] be review. But such a tribunal is a specially constituted three-judge court, with a possibility of direct appeal to the Supreme Court of the United States. Whether the industry of transportation of goods in interstate and foreign commerce requires that "loaders", such as plaintiffs, be regulated by the Commission, is a complicated question requiring expert technical treatment, as was said in dealing with a rate situation in *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 235, 238-9:

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct

[10] S. 13(b)(1) of the Fair Labor Standards Act of 1938.

[11] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315.

> appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Commision*, 206 U. S. 441, 454. And to that body, in the interest of uniformity, the determination must be left."

The determination of whether the Commission has "power" over the "loaders", who fall in the classification with plaintiffs, is one which will set the pattern for the future and will cover many states of fact, as has the determination that "drivers" are under their authority. The analogies [fol. 54] of *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, are compelling. Here, as there, expert judgment in the light of pragmatic conditions of operation, should not be hampered by judicial pre-judgment on the circumscribed facts involved in a single case. The criticism of the application thereof, though ably stated, is not convincing.[12]

The parallels between the instant situation and that of rate determination are brought out prominently by consideration of an excellent opinion by Judge Coffey of this court, under title of *Fitzhery* v. *Erie Railroad Company*.[13] There a shipper brought suit to enjoin the railroad from continuing the practice of making progressive charges for truckage and, when freight carried was of a certain weight, making no charge therefor. The contention there was, that such a schedule infringed "the statute itself" and, therefore, the shipper was entitled to injunction without ever having applied to the Commission. It was said in the opinion:

> "It may well be that the line drawn by the defendant between the service for which it does and the service for which it does not make a charge is erroneous. It may even be that it can be established that it is arbi-

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[12] Judge William C. Coleman, in *Missel* v. *Overnight Motor Transportation Co., Inc., supra.*

[13] 7 F. Supp. 880, 883.

trary. The defendant may be unable to sustain the reasonableness or justice of the practice. Whether this be so presents a problem of vast complications. Its solution would involve assembly and consideration of a great mass of facts having an economic bearing and having to do with the way railroad transportation is [fol. 55] carried on, a court, however, is not equipped initially to pass on it. Congress has erected and maintains the commission for the very purpose of conducting the investigations and making the findings needed for reaching intelligent conclusions about such matters. Until those investigations have occurred and those findings are before the court, it is not within its province to entertain lawsuits in which extraneous factors are determinative or even play a part. The philosophy of the foundation on which this proposition rests seems to me never to have been better elucidated than in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas., 1075, when it was originally announced."

The question is what action should be taken here. Although there is authority to the contrary,[14] the court, in view of the fact that the holding is novel, should permit the cause to retain undismissed, if the plaintiffs indicate a serious intention of having their status fixed by the Commission.

The cause will be held open for further action.
Filed Dec. 20, 1943.
U. S. Dist. Ct. S. D. N. Y.

[fol. 56] In United States District Court

Notice of Motion

Sir:

Please take notice that upon the annexed affidavit of Deane Ramey, sworn to the 15th day of November, 1944, the affidavit of Leon E. Spielvogel, sworn to the 16th day of November, 1944, and upon all of the other proceedings here-

[14] *Baltimore & Ohio Railroad* v. *Denneye & Co.*, 246 Illinois App. 22, 24.

tofore had herein, the undersigned will move this Court at a Regular Term for Motions to be held in the United States Courthouse, Room 506, located at Foley Square, in the Borough of Manhattan, City and State of New York, on the 28th day of November, 1944 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order making a final disposition of the above entitled action, and for such other, further and different relief as to the Court may seem proper.

Dated, New York, November 18th, 1944.

Yours, etc., Leon E. Spielvogel, Ramey & McKelvey, of counsel. By Deane Ramey, a member of the firm, Attorneys for Plaintiffs, 501 Fifth Avenue, New York, N. Y. 17.

To: Charles E. Cotterill, Esq., Attorney for Defendant, Office & P. O. Address, 70 East 45th Street, New York 17, N. Y.

[fol. 57] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEANE RAMEY READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, *ss:*

Deane Ramey, being duly sworn, deposes and says: That I am a member of the law firm of Ramey and McKelvey, appearing of counsel to Leon H. Spielvogel, Esq., the attorney of record for the plaintiffs above named, and submit this affidavit in support of the within application that an order be made and entered herein, either rendering judgment in favor of the plaintiffs or in favor of the defendant and thereby cause a final disposition to be made of the above entitled action which has been pending before this Court and undetermined for a period of almost two years.

The facts and circumstances upon which this application is based are as follows—the defendant is a domestic corporation organized and existing under and by virtue of the laws of the State of New York and was and still is engaged in the business of shipping and transporting by motor truck, goods wares and merchandise in interstate commerce between the State of New York and points outside of the State of New York.

During the period from October 24, 1938 to and including September 1, 1941 the plaintiffs were employed by the defendants in the City of New York to deliver from the defendant's sub-terminals to divers consignees thereof, parcels [fol. 58] and packages which the defendant had transported in interstate commerce. In the regular course of their duties, the plaintiffs likewise called at the places of business of divers firms, persons and corporations and picked up parcels and packages which plaintiffs delivered to defendant's said subterminals for shipment by the defendant in interstate commerce. The said action was commenced by the plaintiffs against the defendant to recover under and pursuant to the Fair Labor Standards Act of 1938 overtime wages and compensation for services which the plaintiffs rendered to the defendant during the said period above mentioned.

After the said action had been pending before this Court for some time, it came on for a pre-trial hearing before Hon. James Alger Fee, a visiting United States District Judge from Oregon, who was sitting in this court at the time. As a result of the said pre-trial hearing, the attorney for the plaintiffs and the attorney for the defendant entered into a written stipulation in which all of the facts were agreed upon. On the basis of this stipulation, Judge Fee signed an order which embodied all of the stipulated facts and provided that the judgment of the Court was to be predicated thereon.

Thereafter and on the 29th day of November, 1943, Judge Fee filed a lengthy opinion in which, among other things, he stated in substance, that in view of the fact that the defendant was under the jurisdiction of the Interstate Commerce Commission, the action should be permitted to remain undismissed "if the plaintiffs indicate a serious intention of having their status fixed by the commission." The opinion made no disposition whatever of the action but on the contrary, made it incumbent upon the plaintiffs to apply to the Interstate Commerce Commission for a ruling on their status as employees of the defendant so as to determine whether or not their activities were such as affected the safety of operation of the defendant's motor vehicles. The burden which [fol. 59] Judge Fee thus placed on the plaintiffs was for the purpose of ascertaining whether or not the said plaintiffs came within the exemption provisions of Section 13 (b) (1) of the Fair Labor Standards Act.

Thereafter and on the 4th day of April 1944 my firm was retained by Mr. Spielvogel, of counsel in the matter and on June 19, 1944 we addressed a letter to Judge Fee, who had returned to Oregon, apprising him of this fact and calling his attention in general to the opinion which we attempted to point out was, in our opinion, erroneous. We also advised Judge Fee that the plaintiffs did not intend to apply to the Interstate Commerce Commission as suggested in his opinion, and we closed this letter by asking Judge Fee to reconsider his opinion and render judgment in favor of the plaintiffs, or to withdraw such opinion and return the file to this Court so that the plaintiffs would have the opportunity of proceeding before other judges who were available. A copy of this letter was addressed to Charles E. Cotterill, Esq., the attorney for the defendant who thereafter forwarded to us a copy of a letter dated June 26, 1944 addressed to Judge Fee in which, among other things, he stated that the Administrator of the Wage & Hour Division of the Department of Labor, as well as the Interstate Commerce Commission, had patterned their current proced re in the light of Judge Fee's opinion. On June 28, 1944 we likewise received a letter from Judge Fee in reply to our letter of June 19th, in which, among other things, he stated:

> "If counsel desire to have a rehearing upon the matter by written briefs submitted here, such a motion will be entertained, otherwise the Court will take no action except to dismiss the cause in accordance with the original opinion."

After receiving Mr. Cotterill's letter in which he advised Judge Fee that the Wage & Hour Division, Department of [fol. 60] Labor, had patterned its procedure in the light of the said opinion, we called it to the attention of Irving Rozen, Esq., Regional Attorney for the Wage & Hour Division, and on August 25, 1944 Mr. Rozen wrote a letter to Judge Fee in which he stated that even though the Wage & Hour Division had no desire to inject itself into this litigation, he believed it necessary to correct the statement which had been made by the defendant's attorney. Mr. Rozen likewise advised that the Administrator has taken the position that the burden of establishing that a person comes within the exemption provision of the Fair Labor Standards Act is upon the person asserting it and that his office did not sub-

scribe to the theory that an employee of a motor carrier must petition the Interstate Commerce Commission for an administrative ruling with respect to his status.

In line with Judge Fee's letter of June 28, 1944 in which he advised that he would consider written briefs upon the matter of a rehearing, we wrote to him on August 28, 1944 and set forth a full discussion regarding our views in the case. We likewise set forth several citations as well as extracts therefrom which we believe supported our position and we asked that our letter of August 28, 1944, together with our previous letter of June 19th be considered as constituting our brief in support of an application for a rehearing. We again advised that the plaintiffs did not intend to apply to the Interstate Commerce Commission to fix their status as employees and closed this letter by saying:

> "We ask Your Honor to reconsider this case in accordance with this and our previous request, but should you not be inclined to alter your former opinion and grant judgment to the plaintiffs, we then ask that your Honor enter a final order which will dispose of the matter as far as the District Court is concerned and thereby enable us to take the case to the Circuit Court of Appeals."

[fol. 61] Thereafter and under the date of October 13, 1944 Judge Fee filed a writing which was termed an opinion but it was in reality nothing more than a criticism of counsel for employing correspondence as a means of seeking a rehearing, as well as a criticism of the Regional Attorney of the Wage and Hour Division for writing the letter above referred to. It made no disposition whatever of the said action and it is now in the same position that it was when the opinion of November 1943 was filed.

As the matter now stands these plaintiffs have been prejudiced and their rights impaired by the Court failing to make a final determination of the case either by granting judgment in favor of the plaintiffs or dismissing the complaint. The attorney for the defendant has made no effort to have the complaint dismissed and I do not believe that he will make any such effort for the reason that it is to the benefit of the defendant to allow this cause to remain in its present uncertain condition.

We have already indicated that the plaintiffs do not intend, neither will they apply to the Interstate Commerce

Commission to fix their status as employees of the defendant and I submit that they are entitled to a final determination of this action on the basis of the stipulated facts hereinbefore mentioned and referred to.

Wherefore I pray that an order be made and entered herein making a final disposition of the said action either by granting judgment in favor of the plaintiffs or by dismissing the complaint so that the plaintiffs will then be able to apply to the Circuit Court of Appeals for the relief which I feel so far has been denied them. I also ask that such other, further and different relief be allowed these plaintiffs as to this Court may seem proper.

Sworn to before me this 15th day of November, 1944.

(Sgd.) Deane Ramey.

(Sworn to November 15, 1944)

[fol. 62] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEON E. SPIELVOGEL READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, *ss:*

Leon E. Spielvogel, being duly sworn, deposes and says: That I am the attorney of record for the plaintiffs above named and submit this affidavit in conjunction with the affidavit of Deane Ramey hereto annexed, in support of the within motion that an order be made and entered herein making a final disposition of the within action. That I have read the contents of the affidavit of the said Deane Ramey, hereto annexed, and know the contents thereof to be true. I also state that on April 4, 1944 I retained Mr. Ramey of counsel in this matter and authorized him to adopt such measures as he might deem necessary in this matter. I likewise state that everything that he has done up to this point has been with my knowledge and approval and I join with him in the application for the relief sought herein.

(Sgd.) Leon E. Spielvogel. Filed Feb. 19, 1945. U. S. Dist. Ct. S. D. N. Y. (Sworn to November 16, 1944.)

[fol. 63] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 20-145

OPINION—January 12, 1945

JAMES ALGER FEE, D. J.

This is an action by certain employees against a common carrier by motor in interstate commerce to recover overtime claimed to be due under the provisions of the Fair Labor Standards Act. The court held that there was a technical administrative question involved which must be determined by the Interstate Commerce Commission before a judgment could be rendered for plaintiffs.[1] However, summary judgment of dismissal was not entered and opportunity was given to plaintiffs to present the question to the Commission.

Now, plaintiffs have filed a motion which may be treated as an election not to present the technical question to the Commission, nor to present further pleadings or proofs. No showing has been made to the court that plaintiffs were not employees for whom the Commission may have jurisdiction to prescribe maximum hours of service. There is no showing that the Commission has excluded plaintiffs, or the classes of employees to which each respectively belongs, from the circle of jurisdiction.

[fol. 64] Careful explanation of the action of the court was made in the first opinion in this case, but review of the reasons now seems necessary to avoid misconception. It is contended that in each action of this sort the court must primarily pass upon the question of whether the duties of a particular plaintiff tend "to promote safety of operation" of the motor vehicles involved. But Congress invested the Commission with power to determine that exact question because safety of operation is a "characteristic of transporation" and "inherent in that industry".[2]

The Supreme Court of the United States determined that the Interstate Commerce Commission and the Wages and

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[1] *Ispass* v. *Pyramid Motor Freight Corporation*, 54 F. Supp. 565.

[2] 13 N. C. C. 481, 489.

Hours Division of the Department of Labor were correct in holding that the Commission had the power to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers only as to those employees whose duties affect safety of operation. But the Supreme Court did not undertake to pass upon the question of which specific employees performed duties which did affect safety of operation. Nor was this authority committed to other Courts, but was lodged in the commission primarily.[3] We need not debate whether there is a syncretism between the doctrine of "exhaustion of administrative remedies"[4] and the doctrine of "primary jurisdiction,"[5] nor discover how far such doc-
[Vol. 65] trines were fused.[6] It is sufficient to say that the question before the court "demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statutes administered."[7]

In this field, factual distinctions exist between the conductorette and the dispatcher, the armed guard and the car oiler, the ordinary mechanic and the tarpaulin tailor.[8]

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[3] The effect of a finding of the Commission is not germane to the present discussion.

[4] "The fact that some sort of administrative determination has been made obviously places no barriers across related legislative pathways which remain untrodden." Vom Baur, Federal Administrative Law, Vol. I, Sec. 227.

[5] "Keystone of the arch of administrative regulation is the 'primary jurisdiction' rule." Harv. Law Rev., Vol. 51, p. 1251.

[6] "In both its aspects, exclusive jurisdiction and exhaustion of remedy, it promotes expert analysis and uniform determination of questions of administrative discretion, and through judicial self-limitation it avoids premature interference with the process of administrative regulation." Harv. Law Rev., Vol. 51, p. 1267.

[7] 42 Am. Jur. Sec. 254.

[8] 13 M. C. C. 481.

The courts should not be required to accept the responsibility of such initial determinations. The courts are entitled to the assistance of specialized tribunals for a primary sifting of problems of a technical genesis which result from the complicated nature of an industrialized society.[9] These related doctrines developed out of the attempt of the courts to obtain expert aid in the solution of such technological situations.[10]

[fol. 66] The very crux of this case is the determination, on an involved set of facts, of whether the duties of plaintiffs, or any of them, tend to promote safety of operation of loading and unloading of the vehicles on which they work. The court might perhaps make the correct determination. If it be a duty to decide, the court would have no hesitation. But there should be hesitation in entering the limits of a field which Congress has expressly, and the Supreme Court impliedly, said is too technical to permit of solution by usual rules. Here the answer as to jurisdiction of the Commission and the ultimate solution of the status of the employees are identical. Each depends upon a state of facts which requires technical appraisal for evaluation.[11]

As was pointed out in the previous opinion, a single District Judge should not be so greedy of jurisdiction as to attempt to solve such problems contrary to well established canons of public administrative law. If a breach is to be

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[9] Raoul Berger, "Exhaustion of Administrative Remedies," Yale Law, J., April 1939, No. 6, Volume 48, pp. 981-1606.

[10] The application of such doctrines was authoritatively made in the *Abilene* case (204 U. S. 426), a rate case cited in the former opinion, but ramifications are now met in all fields. "Railroad regulation developed the doctrine, public utility regulation expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industrial regulation have adopted it." Harv. Law Rev., Vol. 51, p. 1252, Cf. *Mitchell* v. *United States*, 313 U. S. 80.

[11] Any implications from *Crowell* v. *Benson*, 285 U. S. 22, are not controlling. See *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-1.

made in this wall, it should be accomplished by the higher appellate courts.[12]

This cause should, therefore, not be determined on the basis of the affirmative in the pleadings, nor the incidence of the burden of proof. Nor should a determination be based upon the question of whether a technical exemption is created by the statute as a result of which the proof of [fol. 67] the fact that a plaintiff performs work which promotes the safety of the operation of the motor vehicles falls upon defendant.

Instead, we must assume a position diametrically opposite. We follow the principle that where the creation of a class is left to one administrative body, or any determination of fact involving technical capacity is so delegated, such questions should be there determined before this court proceed to judgment.

The court does not lose jurisdiction because the administrative remedy has not been pursued, but on the other hand, the court need not proceed to a determination until the administrative question be resolved by the appropriate authority.[13]

It is urged vociferously that the court has adopted novel and exotic procedure in this cause to the detriment of plaintiffs. On the contrary the course pursued has been standardized to the point where it can almost be called exclusive. There are two standard methods of disposal of this type of case. In the article on Public Administrative Law in American Jurisprudence,[14] it is said:

> "In applying the doctrine of primary jurisdiction, the court may dismiss the complaint where the question involves an administrative question necessitating pri-

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[12] "The logic of the development of the rule demands a crystallization of its non-discretionary nature in all branches of the doctrine. * * * Were the exhaustion requirement rigorously applied in each instance, much of this wasteful litigation would soon be cut off at the source." Raoul Berger, "Exhaustion of Administrative Remedies," Yale Law J., April 1939, No. 6, Volume 48, 981, 1006.

[13] 42 Am. Jr., p. 699 n. 20; 281 U. S. 412; 259 U. S. 285.

[14] 42 Am. Jr., p. 702, Public Administrative Law, Sec. 254.

mary resort to the administrative tribunal.[15] How-
[fol. 68] ever, the presence of such an administrative question does not deprive the court of jurisdiction,[16] and where there are rights which may be saved by retaining the cause, the court should do so but stay its hand pending the administrative determination." [17]

In the first opinion, the court, conceiving that the plaintiffs had rights which might be saved by retention of the cause, stayed its hand. Since that course of action has provoked violent attacks by plaintiffs,[18] the court now dismisses the action.

Filed Jan. 18, 1945. U. S. Dist. Ct. S. D. N. Y.

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[15] Citing *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *St. Louis, B. & M. R. Co.* v. *Brownsville Nav. Dist. 304*, U. S. 295. 82 L. Ed. 1357, 58 S. Ct. 868, rehearing denied in 305 U. S. 668, 83 L. Ed. 433, 59 S. Ct. 55; *Campbell* v. *Milwaukee Electric R. & Light Co.*, 169 Wis. 171, 170 N. W. 937, 6 A. L. R. 628.

[16] Citing *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied in 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465.

[17] Citing *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied in 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

[18] The court notes this motion was not filed until a memorandum of opinion had been filed calling attention to the fact that extralateral communications with the judge do not constitute proper basis for the determination of litigation. Previously, but after the filing of the main opinion, one of the present attorneys for plaintiffs, who was not then counsel of record, wrote a letter to the trial judge containing expressions verging upon the contemptuous and concluding with the pressure of the remarkable request "that Your Honor resolve this case in favor of the plaintiffs herein, or withdraw your opinion completely, and return the file to this Court so that the plaintiffs may have the opportunity to proceed upon the stipulated facts to judgment either by motion or by trial."

[fol. 69] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 20-145

MURRAY ISPASS, et al., Plaintiffs,

against

PYRAMID MOTOR FREIGHT CORPORATION, Defendant.

ORDER DISMISSING COMPLAINT

The above entitled action having been duly commenced by the plaintiffs for judgment in their favor and against the defendant for overtime compensation under and pursuant to the provisions of the Fair Labor Standards Act of 1938, and the defendant having appeared herein and issue having been duly joined by the filing of the defendant's answer, and the cause having regularly come on for trial before Hon. James Alger Fee, United States District Judge for the District of Oregon, sitting as a visiting judge in this Court, on the 3rd day of May, 1943, and the parties hereto having duly appeared by their respective attorneys, and submitted to the Court, in lieu of the offering of proof, an agreed statement of facts setting forth the issues framed by the complaint, and the Court, upon the consent of the attorneys for the respective parties, having thereupon made and entered an order herein on the said 3rd day of May, 1943, wherein and whereby the said agreed statement of facts which were submitted by the attorneys for the respective parties, as aforesaid, was set forth as the issues framed by the complaint and answer, and the said action having been submitted to the Court for [fol. 70] its determination upon the said agreed statement of facts and order hereinbefore mentioned and referred to, and the Court having thereafter and on the 20th day of December, 1943, filed in the Office of the Clerk of this Court an opinion, bearing date the 29th day of November, 1943, wherein it was stated that the action should be permitted to remain undismissed pending an application by plaintiffs to the Interstate Commerce Commission for a ruling by the Commission regarding their status as employees of the defendant and a determination by the

Commission as to what jurisdiction, if any, the said Commission had power to excercise over the plaintiffs, and the plaintiffs having thereafter indicated their reluctance to adopt the procedure indicated by the said opinion, and having moved this Court for final judgment on the pleadings, and the said motion having regularly come on before this Court on the 28th day of November, 1944 before Hon. John Bright, who thereupon caused the said motion to be referred to the said Hon. James Alger Fee, who thereupon caused to be filed in this Court on the 18th day of January, 1945, an opinion bearing date the 12th day of January, 1945,

Now, on reading and filing the summons and complaint herein, the order of this Court, dated the 3rd day of May, 1943, the opinion dated the 29th day of November, 1943, the notice of motion dated the 18th day of November, 1944, the affidavit of Deane Ramey, sworn to the 15th day of November, 1944, in support of the said notice of motion, and the opinion, dated the 12th day of January, 1945, and due deliberation having been had thereon it is

Ordered that the complaint be and the same hereby is dismissed and that judgment be entered abating and dismissing said action, without prejudice to the rights of plaintiffs, or any one of them, to bring other actions or [fol. 71] proceedings for the establishment of their respective claims, either administratively or at an appropriate time, by action in this court or other proper tribunal.

Dated this 14th day of February, 1945.

James Alger Fee, United States District Judge.

Judgment Rendered, George J. H. Follmer, Clerk, Feb. 19, 1945.

[fol. 72] In United States District Court

Notice of Appeal

Sir:

Notice is hereby given that the plaintiffs above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from an order and judgment made and rendered in this action on the 14th day of February,

1945, in favor of the defendant, Pyramid Motor Freight Corporation and against the plaintiffs, dismissing the complaint herein, and from the whole of the said order and judgment and each and every part thereof.

Dated, New York, March 29, 1945.

Leon E. Spielvogel, Ramey and McKelvey, of Counsel. By (Sgd.) Deane Ramey, A member of the firm, Attorneys for Plaintiffs, Office and P. O. Address, 501 Fifth Avenue, New York, N. Y.

To: Charles E. Cotterill, Esq., Attorney for Defendant, 70 East 45th Street, New York, N. Y., Clerk of United States District Court, Southern District of New York.

[fol. 73] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, Carroll Mackler, Louis H. Shapiro, Sam Lanorith and Joseph Gannon, Plaintiffs-Appellants

against

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

The plaintiffs-appellants having moved this Court for an order extending their time within which to file the Record on Appeal herein, and the said motion having regularly come on before Hon. August N. Hand, one of the Judges of the Circuit Court of Appeals, Second Circuit, on the 20th day of July, 1945, and due deliberation having been had thereon;

Now, on reading the affidavit of Deane Ramey, sworn to the 19th day of July, 1945, and all the other proceedings herein, it is

Ordered, that the time within which plaintiffs-appellants above named shall have within which to serve and file the Record on Appeal herein, be, and the same hereby is extended to the first day of September, 1945.

Dated: New York, July 20, 1945.

August N. Hand, Judge of the Circuit Court of Appeals, Second Circuit. (Seal.)

[fol. 73a] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

-v.-

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

NOTICE OF MOTION

To the Plaintiffs-Appellants or Their Attorneys:

Notice is hereby given that on October 1, 1945, at the time appointed by the court for such a purpose, the defendant-respondent in the above-entitled case will present to the United States Circuit Court of Appeals for the Second Circuit at the Federal Court House, Foley Square, Borough of Manhattan, City of New York, its motion to dismiss the appeal for the reasons stated in such motion a copy of which is annexed hereto.

(Sgd.) Charles E. Cotterill, 70 East 45th Street, New York, N. Y., Attorney for defendant-respondent.

September 5, 1945.

Service hereof acknowledged this 6th day of Sept., 1945.
(Sgd.) Ramey & McKelvey, Attorneys for plaintiffs-appellants.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

Docket No. 19-908.

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

AMENDED MOTION OF DEFENDANT TO DISMISS APPEAL

Comes now the defendant-respondent, Pyramid Motor Freight Corporation, and respectfully moves that the appeal herein be dismissed for the following reasons:

1. The plaintiffs-appellants did not, within the time prescribed by act of Congress, docket their appeal and make and file a transcript of the record before the court below.

2. The plaintiffs-appellants, before the expiration of the time prescribed by act of Congress for docketing an appeal and making and filing a transcript of record before the court below, did not make application to the court below for an extension of time within which to do so.

3. It is not within the authority of the United States Circuit Court of Appeals, under the circumstances, to extend the time for docketing the appeal and making and filing such transcript of record.

4. Application to the Circuit Court of Appeals for an extension of time merely as to the record was not made until more than ninety (90) days after plaintiffs-appellants' notice of appeal. Therefore this court does not possess authority to extend the time for docketing the appeal and making and filing the transcript of record.

[fol. 75] 5. Even if such authority existed in this court it was not within the authority of any one Judge thereof (Hon. August N. Hand) to make and enter on July 20, 1945, an order so extending the time for making and filing the record on appeal on or before September 1, 1945.

6. If this court or any one member thereof possessed such authority, under the circumstances, its exercise is required to be governed by sound judicial determinations and is not a mere matter of discretion. The affidavit of one of the attorneys for plaintiffs-appellants in support of the application for extension of time, upon which the order of Judge Hand was made July 20, 1945, does not set forth any facts showing an excusable reason for the failure of plaintiffs-appellants or for counsel to have filed the record on appeal within the time otherwise prescribed by act of Congress.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

September 24, 1945.

[fol. 76] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Civil Action No. 19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

MOTION OF DEFENDANT TO DISMISS APPEAL

Comes now the defendant-respondent, Pyramid Motor Freight Corporation, and respectfully moves that the appeal herein be dismissed for the following reasons:

1. The plaintiffs-appellants did not, within the time prescribed by act of Congress, make and file a transcript of the record before the court below.

2. The plaintiffs-appellants, before the expiration of the time prescribed by act of Congress for making and filing a transcript of record before the court below, did not make application to the court below for an extension of time within which to do so.

3. It is not within the authority of the United States Circuit Court of Appeals, under the circumstances, to extend the time for making and filing such transcript of record.

4. Application to the court for an extension of time was not made until more than ninety (90) days after plaintiffs-appellants' notice of appeal. Therefore this court does not possess authority to extend the time for making and filing the transcript of record.

[fol. 77] 5. Even if such authority existed in this court it was not within the authority of any one Judge thereof (Hon. August N. Hand) to make and enter on July 20, 1945, an order so extending the time for making and filing the record on appeal on or before September 1, 1945.

6. If this court or any one member thereof possessed such authority, under the circumstances, its exercise is required to be governed by sound judicial determinations and is not a mere matter of discretion. The affidavit of one of the attorneys for plaintiffs-appellants in support of the application for extension of time, upon which the order of Judge Hand was made July 20, 1945, does not set forth any facts showing an excusable reason for the failure of plaintiffs-appellants or for counsel to have filed the record on appeal within the time otherwise prescribed by act of Congress.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

August 13, 1945.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

MURRAY ISPASS, et al., Plaintiffs-Appellants,

Docket No. 19-908

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

AFFIDAVIT

I, Charles E. Cotterill, attorney at law and a member of the bar of this court, having my professional office at 3722 Grand Central Terminal Building, 70 East 45th Street,

New York City, and being the attorney of record for the defendant in the above-entitled action, on oath say:

In this action the attorneys of record for the plaintiffs were and are Leon E. Spielvogel and Benjamin C. Klores. On November 29, 1943, Hon. James Alger Fee, then sitting as a United States District Judge for the Southern District of New York, rendered his opinion in this action. According thereto it was determined by him that the character of labor performed by the plaintiffs at the time they were within defendant's employment, was "within the power" of the Interstate Commerce Commission to prescribe for them their maximum hours of employment, that whether or not the character of such labor affected safety of operation of motor vehicles presented an administrative question within the authority of the Interstate Commission, but that the action would not then be dismissed if the plaintiffs showed any disposition to approach the Interstate Commerce Commission for a different determination of their status.

Neither the plaintiffs nor their attorney of record did so proceed before the Interstate Commerce Commission at any time.

[fol. 79] Nearly a year later the attorneys of record for the plaintiffs together with Ramey and McKelvey, then brought in only by Attorney Spielvogel as "Of Counsel to Mr. Spielvogel", began to bombard Judge Fee with caustic critical letters addressed to him in Oregon denouncing his action of about one year previous and saying to him he should revoke his opinion.

Judge Fee thereupon prepared and filed as a part of the record in the case his declaration of the impropriety of the conduct of plaintiffs' attorneys and directing that their correspondence with him, and his admonitory declaration, be made a part of the judicial file in the action.

On November 18, 1944, attorneys for the plaintiffs moved for final disposition of their action upon their declaration that they had not done so and would not avail their administrative remedy before the Interstate Commerce Commission.

Bearing date of January 12, 1945, Judge Fee thereupon rendered a further opinion affirming his original conclusion, directing dismissal of the action, and describing the conduct of the attorneys as "virtually contemptuous".

Thereupon judgment of dismissal was entered February 14, 1945.

Notice of appeal was given April 2, 1945.

But each of the four attorneys for the plaintiffs neglected to docket the case in the Court of Appeals and to file within forty days thereafter the record on appeal, or within that period of forty days to apply to the United States District Court for an extension of time within which to do so.

Attorney Ramey on July 18, 1945, more than ninety days after the notice of appeal, tendered the record to the Clerk of the District Court for certification. Even had Mr. Ramey or his associate, Mr. McKelvey, applied for and obtained an extension from the District Court (which neither did) such an extension would have expired on July 3, 1945.

[fol. 80] More than ninety days after the notice of appeal (on July 20, 1945) the firm of Ramey and McKelvey applied to one of the members of this honorable court for an order extending the time within which they might so file the record on appeal. No application for an extension of time for docketing was ever made.

July 20, 1945, Hon. Augustus Hand, a member of this court, passed such an order.

In support of their application to this court for an extension of time, filed more than ninety days after the notice of appeal, a member of the firm of Ramey and McKelvey, in an affidavit, recited nothing more by way of excuse for the neglect than that he had thought his partner had attended to the securing of an extension from the District Court and his partner had thought Mr. Ramey had done so. Why the attorneys of record, Messrs. Spielvogel and Klores, had not attended to the record or an extension of time was not stated in that or any other showing to the court.

Nearly two years have elapsed since the determination of Judge Fee that the plaintiffs had no judicial remedy. During the time when the action was pending before Judge Fee the defendant company carried on its books of account a reserve for any contingent liability. In view of the outcome before Judge Fee in 1943 and the failure of counsel for the plaintiffs during nearly one year to take any further steps in the matter defendant company cancelled the reserve and has since paid corporate taxes thereon as income.

The defendant has moved to dismiss this appeal on the grounds that there is a want of authority in the Circuit Court of Appeals to entertain it at any time or of one member or a majority of the members of this court to extend the time for docketing the case and filing the record upon an application and order made more than ninety days after the notice of appeal. Such motion is further grounded upon [fol. 81] the contention that the neglect of the various attorneys for the plaintiffs in not docketing the case and filing the record within the time appointed by law was not excusable within judicial cognizance or sound judicial discretion.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

September 24, 1945.

Sworn to and subscribed before me a Notary Public in and for the County of New York. (Sgd.) Helen A. Walsh, Notary Public, Kings Co. No. 287, Reg. No. 203-W-7. Certificate filed in New York County, N. Y. Co. Clerk's No. 15, Register's No. 280-W-7. Commission expires March 30, 1947. (Seal.)

September 24, 1945.

[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Docket No. 19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

SUPPLEMENTAL AFFIDAVIT OF COUNSEL FOR THE DEFENDANT

STATE OF NEW YORK,
County of New York, ss:

Charles E. Cotterill, being duly sworn deposes and says: that he has been from the beginning and remains the sole attorney of record for the defendant-respondent in the

described action, that on this day, September 28, 1945, he received from Leon E. Spielvogel, one of the two attorneys of record for the plaintiffs-appellants, and from Deane Ramey, "Of counsel to Mr. Spielvogel", a notice that upon the return date (October 1, 1945) of the defendant-respondent's motion to dismiss the appeal, such attorneys will move this court for an adjournment thereof "to the date of the argument of the said appeal, or for such other date as will afford the undersigned an opportunity to prepare and submit to the said court a brief or other papers in opposition thereto". Accompanying that notice of intended motion is an affidavit of Mr. Deane Ramey who describes himself as a member of the firm of Ramey and McKelvey, the attorneys who are appearing and prosecuting this appeal as "Of counsel" to the attorneys of record for the plaintiffs-[fol. 83] appellants. Neither Mr. Ramey nor the firm of Ramey and McKelvey makes any claim to be attorneys or attorneys of record for the plaintiffs-appellants.

The defendant-respondent served on the 6th day of September, 1945, its notice of motion, returnable October 1, 1945, to dismiss the appeal.

On September 25, 1945, as a professional courtesy, defendant-respondent transmitted to Mr. Ramey a copy of b f in support of the dismissal motion intended to be filed with this court upon the hearing of the dismissal motion October 1.

In the affidavit of Mr. Ramey, dated September 27, 1945, in support of his intended motion to adjourn the hearing and consideration of the motion to dismiss the appeal, nothing is said further in support of that intended motion except that commencing September 24, Mr. Ramey began to await assignment to a Part in the Supreme Court of the State of New York, County of New York, to conduct a trial and that such assignment was made and the trial would actually commence on September 27. It is said further that Mr. Ramey has another trial in the State court on Friday, September 28.

Inasmuch as the motion to dismiss the appeal was served on September 6, 1945, made returnable October 1, 1945, the fact that Mr. Ramey, not an attorney of record in the action, became engaged during the last week of September in State court trial work affords no excuse for adjournment of the hearing and consideration of the defendant-appel-

lee's motion to dismiss the appeal. It is not said by Mr. Ramey that he is to be engaged in State court trial work October 1, the return date of the dismissal motion. Having [fols. 84-85] accepted service of notice of dismissal motion on September 6, 1945, returnable October 1, Mr. Ramey had the entire time between then and September 25 to prepare himself for argument on the dismissal motion October 1.

No showing is made by Mr. Spielvogel, the only apparent attorney of record for the plaintiffs-appellants, as to why dismissal motion should not be argued and taken under advisement on October 1 as now provided by the notice of dismissal motion.

It is said by Mr. Ramey that in the brief of counsel for the defendant-appellee in support of the dismissal motion there is argued the rightness of the decision of the court below dismissing the action. That is not so. The defendant's brief in that respect goes no further into the merit of the case in the court below than to point out that there was no obvious error committed by the District Court in dismissing the action. Defendant has not prepared its brief on the merit of the case in the court below.

(Sgd.) Charles E. Cotterill, Attorney for defendant-respondent.

September 28, 1945.

Sworn to and subscribed before me a Notary Public in and for the County of New York. (Sgd.) Helen A. Walsh, Notary Public, Kings Co. No. 287, Reg. No. 203-W-7. Certificate filed in New York County, N. Y. Co. Clerk's No. 15, Register's No. 280-W-7. Commission expires March 30, 1947. (Seal.)

September 28, 1945.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of October, one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Charles E. Clark, Circuit Judges.

MURRAY ISPASS, et al., Plaintiff-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Appellee

A motion having been made herein by counsel for the appellee to dismiss the appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 87] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Murray Ispass, et al., v. Pyramid Motor Freight Corporation. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 10, 1945. Alexander M. Bell, Clerk.

[fol. 88] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 89

(Argued November 13, 1945. Decided December 28, 1945)

Docket No. 19908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, Carroll Mackler, Louis H. Shapiro, Sam Lanorith and Joseph Gannon, Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

Before L. Hand, Swan and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act of 1938, 29 U. S. C. A. § 201 *et seq.* From a judgment dismissing their complaint, 59 F. Supp. 341, the plaintiffs appeal. Reversed in part; affirmed in part.

[fol. 89] Leon E. Spielvogel, Attorney for appellants; Ramey & McKelvey, of counsel.

Charles E. Cotterill, Attorney for appellees.

SWAN, Circuit Judge:

This is an action under § 16b of the Fair Labor Standards Act, 29 U. S. C. A. § 216(b), to recover unpaid overtime compensation, liquidated damages and attorney's fees. It was commenced in the City Court of the City of New York, was removed by the defendant to the District Court, and was tried to the court without a jury upon an agreed statement of facts. The plaintiffs are employees of the defendant, a common carrier by motor truck of interstate freight, and the issues framed for trial were whether they were within the coverage of section 7 of the Act, 29 U. S. C. A. § 207, or were exempted therefrom by section 13(b)(1), 29 U. S. C. A. § 213(b)(1), as employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of

service pursuant to the provisions of [illegible]04 of Title 49." Because of doubt on the basis of the agreed facts whether the plaintiffs were subject to the jurisdiction of the Interstate Commerce Commission, the trial judge was of the opinion that decision should be held in abeyance in order that they might have an opportunity to apply to the Commission to fix their status. *Ispass* v. *Pyramid Motor Freight Corp.*, 54 F. Supp. 565. Thereafter the plaintiffs moved for a final disposition of the case, and the trial judge, treating the motion as an election not to apply to the Commission or to present further pleadings or proof, entered an order dismissing the complaint. 59 F. Supp. 341. From this judgment the plaintiffs have appealed.

[fol. 90] Before passing to the merits we consider the appellee's motion to dismiss the appeal. The judgment was entered February 19, 1945. Notice of appeal was duly filed March 29th, but nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the district court or this court until July 20th, when an order was obtained from a judge of this court extending the appellant's time to file the record on appeal until September 1, 1945. On that date the record and the appellants' brief were filed. A motion by the appellee to dismiss the appeal was denied from the bench in October and is now renewed. It is urged that under Rule 73(g) F. R. C. P. only the district court possesses jurisdiction to extend the time to docket an appeal and file the record on appeal. But Rule 73(a) provides that a party may appeal by filing with the district court a notice of appeal and that failure of the appellant to take further steps "does not affect the validity of the appeal, but is ground * * * for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Hence the jurisdiction of the appellate court attaches at the time of filing the notice of appeal and whether a dilatory appellant shall be allowed to proceed is a matter within its discretion. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. C.). In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment. The motion to dismiss is denied.

In construing section 304(a)(1) and (2) of Title 49 the Supreme Court has limited the regulatory power of the [fol. 91] Commission to those employees whose activities affect the safety of operation of motor vehicles. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 553. But it is the existence, not the exercise, of the power that determines their exemption under section 213(b)(1) of Title 29. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. In *Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, the Commission ruled that "loaders" and "helpers", as well as drivers, of motor trucks are subject to its jurisdiction, because the way a truck is loaded affects the safety of its operation. The appellants contend that their activities bring them within this ruling. We must therefore consider the evidence, bearing in mind that the burden of proof is upon the defendant to show which, if any, of its employees are within the exemption. *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Walling* v. *Comet Carriers*, 151 F. 2d 107, 110 (C. C. A. 2); *cf. Stratton* v. *Farmers Produce Co.*, F. 2d 825, 827 (C. C. A. 8).

Laying aside for the moment the case of the plaintiff Shapiro, the agreed statement as to the other plaintiffs is to the following effect: The defendant maintains a main terminal on West 11th Street and a sub-terminal on West 38th Street for the convenience of its customers in the Garment Center of New York City. In the case of northbound (*i. e.*, incoming) trucks, as the helper on the truck pushes the freight packages over the tailboard they are received by the plaintiffs, who place them in the subterminal building, and later in the day deliver them to the various consignees by means of hand-trucks or flat trucks which they push. Sometimes the north-bound trucks by-pass the sub-terminal and stop along the curb in the Garment Center; in such cases the unloading is performed in the same manner as at [fol. 92] the sub-terminal and the plaintiffs then deliver the packages by hand or hand-truck into the buildings in the Garment Center. In the case of south-bound (*i. e.*, outgoing) trucks, some of the freight packages are picked up by the plaintiffs at the consignors' places of business and hand-trucked to the sub-terminal where the plaintiffs "physically load the freight packages into a waiting truck" which proceeds, when loaded, to the main terminal where a new driver is taken on for the journey to destinations south of New York. A down-town employee other than the

plaintiffs also takes part in loading the vehicles at the subterminal. Sometimes trucks for south-bound loadings take up stations on the public streets in the Garment Center where the plaintiffs bring the packages by hand or hand-truck; in such cases the part taken by the plaintiffs in loading consists in lifting the packages to the tailboard "and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the down-town employee, stack and pile the freight in the vehicle." All of the plaintiffs other than Shapiro generally walked between stopping points but occasionally in order to save time, rode upon the truck when it moved from one place to another in the Garment Center.

It seems clear that the unloading activities of the plaintiffs would not bring them within the jurisdiction of the Commission because after the down-town helper pushes the packages over the tailboard their effect upon the safety of operation of the truck ceases. On the other hand the plaintiffs' part in loading the trucks does concern safety of operation. Merely lifting the packages on to the tailboard may not; but when they stand inside the truck body and help the down-town employee to "stack and pile the freight in the vehicle," they act as "loaders" and would come within the Commission's jurisdiction if these duties [fol. 93] occupied a substantial part of their time. In 28 M. C. C. at 131 the Commission said that "we have concluded that we should not assert jurisdiction as to employees who spend an unsubstantial part of their time in performing duties which affect the safety of operation of motor vehicles." It is not clear whether the Commission thought it lacked the power to assert jurisdiction or in the exercise of discretion refused to assert power. We think the former is the correct view. See *Walling* v. *Comet Carriers*, 151 F. 2d 107, 111 (C. C. A. 2); *Levinson* v. *Spector Motor Service*, 389 Ill. 466, cert. granted 14 U. S. Law Week 3126. Upon this record the defendant has not carried the burden of showing that "loading" occupies a substantial part of the working time of the plaintiffs. Accordingly the judgment of dismissal must be reversed and the cause remanded for entry of judgment in their favor and for allowance of an attorney's fee.

As to Shapiro the stipulation states that he regularly and as a matter of fixed duty rode on the truck between

four and five hours daily. On the truck at the same time was the driver and a helper from the main terminal. In addition Shapiro devoted three and a half hours daily to inside office work at the subterminal. Since Chapiro rode the truck for a substantial part of his working time he is a "helper" within the Commission's ruling in 28 M. C. C. at pp. 135-6. As to him the judgment of dismissal is affirmed.

As to the other plaintiffs the judgment is reversed and the cause remanded. An allowance of $200 is awarded to the plaintiffs' attorney for services on the appeal.

[fol. 94] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to Shapiro be and it hereby is affirmed; and the judgment as to the other plaintiffs be and it hereby is reversed with costs and cause remanded in accordance with the opinion of this court.

It is further ordered that an allowance of $200. be and it hereby is awarded to the plaintiffs' attorney for services on the appeal.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 95] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Murray Ispass, et al., v. Pyramid Motor Freight Corp. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 28, 1945. Alexander M. Bell, Clerk.

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing. (Seal.)

[fol. 90] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket and set for argument before a full bench immediately to follow No. 609.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

FEB 7 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 41

PYRAMID MOTOR FREIGHT CORP.,
Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

CHARLES E. COTTERILL,
Counsel for Petitioner,
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New York, N. Y.

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Supreme Court of the United States
OCTOBER TERM, 1945

PYRAMID MOTOR FREIGHT CORP.,
Petitioner,

vs.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANGRITH and JOSEPH GANNON,
Respondents.

No. . . . . .

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

TO THE HONORABLE HARLAN F. STONE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

Summary Statement of Matter Involved

This is an action by Ispass and certain other former employees of Pyramid Motor Freight Corporation (an interstate general commodity motor truck common carrier) to recover claimed unpaid overtime compensation, penalties and counsel fee, as if warranted by Sections 7(a) and 16(b) of the Fair Labor Standards Act of Congress. They were "loaders" and a "helper" whose work was confined to the restricted and congested "Garment Center" of New York City in which Pyramid maintained a "sub-terminal" and near which it also parked its trucks for direct loading and unloading of freight packages, bundles and boxes to and from the garment buildings themselves.

Upon removal from the City Court of the City of New York, in which the action was filed, to the United States District Court for the Southern District of New York, that court on February 14, 1945, dismissed the action as to all the suing employees. (Reported in 54 F. Supp. 565 and 59 F. Supp. 341.)

On belated appeal proceedings the United States Circuit Court of Appeals, on December 28, 1945, sustained the judgment of dismissal as to Shapiro but reversed as to the other former employees. The court also declared that the excuses for the long delay in docketing the appeal and filing the record were "feeble" but that it would not dismiss the appeal merely because a "substantial question" was presented on the merits.

Both the trial court and the Circuit Court of Appeals dealt with the case on the basis of an agreed statement of facts which is set forth hereinafter.

Each court concluded therefrom that the former employees, other than Shapiro, were "loaders" and that Shapiro had been a "helper", as those respective work categories have been defined heretofore by the Interstate Commerce Commission in the assertion of "power" to prescribe the "qualifications" and maximum service hours of work categories affecting safety of operations as considered to be provided by Section 204(a)(1) of the Interstate Commerce Act (U. S. Code, Title 49, Section 304(a)(1)). (*Re Maximum Hours*, 28 M. C. C. 125.)

The District Court, on the agreed facts, concluded that the overtime pay provisions of the Fair Labor Standards Act did not apply because the suing employees were subject to the Interstate Commerce Commission "power" of control over their qualifications and maximum hours. In its first opinion (54 F. Supp. 565), out of an abundance of liberality, the District Court temporarily withheld judgment of dismissal to afford the complaining employees an opportunity, if they so wished, to approach the Interstate Commerce Commission if they felt that the court had misconceived their status under that Commission's determina-

tions. Upon their later positive refusal of that privilege the District Court entered its final judgment of dismissal against them. (59 F. Supp. 341.)

The Second Circuit Court of Appeals on the same agreed facts held that except as to Shapiro the other suing employees were entitled to recovery under the Fair Labor Standards Act because, although their work was that of "loaders" as defined by the Interstate Commerce Commission, only so much of the variable time of "loaders" as would be spent *inside outgoing* truck vehicles *stacking and piling* the freight packages would concern safety of operation. So much of their time, the court said, as consisted of handtrucking the packages to the vehicles or from them, or between vehicles, and so much of their time as related to "unloading" as distinguished from "loading" would not affect safety. Since (the court further held) the agreed statement of facts did not disclose what was the previous division of time in the performance of those several different portions of the work of "loaders" the motor carrier employer had failed to sustain a required "burden of proof" to show to the satisfaction of the court that the time of the workers inside the outgoing vehicles physically piling and stacking the freight was "substantial". What that court would deem to be "substantial" in that connection was not indicated.

Because the former employee named Shapiro was shown by the agreed statement of facts to have been a "rider" on the vehicles several hours daily the Second Circuit Court of Appeals considered that not only was he a "helper" but that he devoted a "substantial" portion of his daily time in the doing of those things, among all the duties of a "helper", which the court considered affected safety. As to that employee the original judgment of dismissal was sustained.

While their notice of appeal to the Circuit Court of Appeals was given in time the employees did not thereafter docket their appeal or file their record in the appellate court until long after the time prescribed by Rule 73(g) of the

Federal Rules of Civil Procedure. Nor did they, before the expiration of the prescribed time, receive from or apply to the District Court for an extension. The Circuit Court of Appeals, while declaring the excuses given for the delay were "feeble", considered that as the correctness of the judgment of dismissal "presents a substantial question" the Circuit Court of Appeals would not dismiss the appeal under Rule 73(a) as authorized so to do.

Fundamentally, therefore, the appellate court concluded that while some of the work of those motor carrier employees described by the Commission as "loaders" and "helpers" affects safety of operation it is not enough that in those respective capacities, in which they may be "solely" engaged, their several interrelated tasks may account for variable portions of their work time in the doing of those particular things deemed by the court itself to bear the more intimately upon safety.

The power of the Commission to fix the qualifications and maximum service hours of those engaged solely in those employment categories of loaders and helpers was in effect denied by the Second Circuit Court of Appeals except to the extent that it should be shown to the judiciary in a *collateral* proceeding under the Fair Labor Standards Act that the particular suing employees devoted a "substantial" although variable proportion of their time actually stowing and stacking outgoing freight in the vehicles or actually riding the vehicles. Because (that court said) the agreed statement of facts in the precent case did not reveal what were those proportions of variable time so devoted to the several components of the work of "loaders" this petitioner for certiorari had not met a "burden of proof" of factually establishing to the satisfaction of the court that the suing "loaders" were "exempt" from the Fair Labor Standards Act. (The opinion of the Circuit Court of Appeals is attached in the Appendix hereof.)

In that respect the Circuit Court of Appeals for the Second Circuit adhered to what it deemed to be the principle of its own previous decision in *Walling* v. *Comet Carriers,*

151 F. (2d) and its interpretation of the decision of the Supreme Court of Illinois in *Levinson* v. *Spector Motor Service*, 389 Ill. 466. (In both certiorari has been granted by the United States Supreme Court.)

The Circuit Court of Appeals for the Second Circuit, in the present case, further, but very erroneously considered that the Interstate Commerce Commission itself, in its dealing with the several categories of interstate motor truck common carrier employees, had determined that its "power" embraces *only* those particular individuals in each of the respective categories (including "loaders") whose work in the course of a given week may involve "substantiality of time" in the doing of those precise things which the court held concern safety of operation.

In deference to the fact that the Supreme Court of the United States had granted certiorari in the two cases of *Walling* v. *Comet Carriers* and *Levinson* v. *Spector Motor Service*, the court below in the present case later stayed its mandate until February 14th, 1946, in stated appreciation of the "importance" of the question and so as to afford the opportunity of preparing and submitting this petition for certiorari prior to the forthcoming reargument of the case of *Levinson* v. *Spector* and the argument of *Comet Carriers* before a full bench of the Supreme Court.

Jurisdictional Statement

It is respectfully submitted that the United States Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925, (C. 229; 43 Stat. 936) amending the Judicial Code, Section 240(a); Title 28 U. S. C. A., Section 347(a); and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented

The principal issues to be resolved by the Supreme Court are these:

(1) As it is made the statutory duty of the Interstate Commerce Commission, an expert administrative body, to prescribe both the "qualifications" and maximum service hours of employees of motor truck freight common carriers whose work affects safety of operations, does not that power of the Commission necessarily embrace as well the peculiarly administrative authority of first determining *which* categories of motor freight common carrier employees it should deal with in prescribing the qualifications and maximum service hours, and is it not an invasion of administrative authority for any court to deal independently with the same question.

(2) In any event, once having made the determinations as to described truck labor categories whose work the Commission considers affects safety, are those determinations of the expert administrative body capable of *collateral* judicial review, rather than by direct statutory court review, when an action for overtime pay is separately and later brought by particular employees in a single-judge court under the Fair Labor Standards Act.

(3) With respect to "loaders" the Commission, in the exercise of its administrative authority, has determined that they consist of those employees whose sole duties are to "load and unload" motor vehicles "and transfer freight between motor vehicles and between the vehicles and the warehouse". In concluding that its power embraces employees whose sole duties are of that general nature the Commission very evidently recognized that considerable amounts of their time are spent in "unloading" and "handtrucking" the freight "between motor vehicles

and between the vehicles and the warehouses" or other buildings near the parked trucks to and from which freight is delivered and received. Because a variable part of the time of those loaders is also regularly spent inside the vehicles stacking and piling the freight the conclusion of the Commission is that safety of operations is substantially affected by their labor as a whole and that as a consequence it should fix their qualifications and maximum service hours. Is the Second Circuit Court of Appeals correct in deciding, contrary to the Commission, in a collateral damage proceeding under the Fair Labor Standards Act, that only so much of the variable time of persons so employed solely as loaders which they devote to stacking and piling of freight in outgoing vehicles affects safety of operations and that as the petitioner for certiorari did not assume a burden of proving the proportions of time so spent out of their other tasks as "loaders" recovery under the Fair Labor Standards Act may be had?

(4) Was the court below correct in its understanding that the Interstate Commerce Commission itself so intended to assert its administrative power over qualifications and maximum service hours *only* over those individual employees who, although solely "loaders", may spend a "substantial" portion of their time inside the vehicles stowing and stacking the outbound freight to be transported?

(5) When only a "feeble" excuse is given for the failure to docket an appeal and file the record in a circuit court of appeals until long after the time prescribed by Rule 73(g) of the Federal Rules of Civil Procedure is it an abuse of judicial discretion for the Circuit Court of Appeals not to dismiss such an appeal, merely because it should be considered that a "substantial question" as to the correctness of the judgment of the court below exists?

Reasons Relied on for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided important questions of Federal law and practice which have not been and should be settled by the Supreme Court.

Certiorari has already been granted in *Levinson* v. *Spector Motor Service* (No. 139, October Term, 1945) and in *Comet Carriers, Inc.* v. *Walling* (No. 609, October Term, 1945). The present case not only goes to questions which appear to have induced the Supreme Court to grant certiorari in those two cases but those particular questions are even more clearly and sharply drawn in the present case than in those other two. Here the facts were agreed, the employees were "solely" engaged in work as "loaders", and all their work related to interstate commerce.

Interstate motor truck common and contract freight carriers employ many thousands of men who are solely "loaders". They not only perform or assist in performing the physical stacking and piling in the outgoing trucks but they do the unloading as well and the handtrucking between the vehicles and the platforms and warehouses and from one vehicle to another. The International Brotherhood of Teamsters, Chauffeurs, etc. (their Union) joined with the employers long ago in urging upon the Interstate Commerce Commission the conclusion, supported by facts of record at public hearings before that Commission, that "loaders", as a work category, should have their qualifications and maximum service hours prescribed by the Commission. That union has never since receded from its original position in that regard by seeking statutory court judicial review or reconsideration by the Commission. Nor has any motor carrier sought direct judicial review or reconsideration. Consequently interstate motor carrier companies have relied upon the seeming widespread acquiescence in the Commission's view and the assumption that no single-judge court, in a damage action under the Fair Labor Standards Act brought by any individual employees,

would sanction a *collateral* attack upon the Commission's determination either boldly or by an attempt to whittle it down through artificial refinements of a "scholastic" nature.

In principle if not in terms what the Commission itself has said regarding the work category of "helpers" similarly applies. That administrative expert body takes the view that it is "neither necessary nor practicable to draw fine distinctions" with reference to the "degree in which individual employees engage" in activity which the Commission considers has effect upon safety of operations.

2. Essentially the Second Circuit Court of Appeals is here endeavoring to extend the application of its own previous decision in *Walling* v. *Comet Carriers*, 151 Fed. (2d) 107 and in which certiorari was granted a few days after the appeals court decision in the present case.

The opinion of that court in the *Comet Carriers* case reveals a fixed point of view by that court seriously at variance with that of the Interstate Commerce Commission. As an expert administrative tribunal the Commission in the exercise of its own statutory authority has negatived the thought that its powers and duties in respect to qualifications and maximum service hours of "loaders" are confined to those workers a substantial part of whose time is spent inside the outgoing trucks stacking and piling the freight. In the case of *Comet Carriers* the Second Circuit Court of Appeals went along with the Commission (seemingly without independent determination) in the conclusion that the work of "drivers" of motor trucks affects safety of operations. The holding there was that unless the weekly task of so driving trucks should embrace more than one day in transporting goods in interstate commerce then the amount of time so devoted to driving vehicles in interstate commerce would not be deemed "substantial". Here in the present case that court has extended and applied that decision to a situation in which the "sole" duties of the "loaders" working exclusively in interstate commerce consisted of the loading and unloading of freight and the handtrucking of it from one vehicle to another and between the vehicles and the

building structures into and out of which the freight to be loaded and unloaded from the trucks must be received and delivered. But here the Court of Appeals would apply the test of "substantiality" to only one of the component and variable parts of the time devoted to a particular part of their task by persons who are "solely" employed as loaders.

This is an unwarranted attempt judicially to invade the administrative province of the Commission and to do so in a collateral proceeding. Unless and until a statutory three judge court shall have reviewed, by direct action, the Commission's determination in this field it is not component so to bring those Commission determinations into judicial question in a damage action under the Fair Labor Standards Act.

3. The Court of Appeals plainly erred in assuming that it is not necessary, in the interest of safety, to prescribe qualifications and maximum service hours for employees who actually and regularly pile and stack freight in the vehicles unless the time they spend in that way, out of their related tasks as loaders, is "substantial".

4. The court below erred in its assumption that the Commission's determination that the work of loaders affects safety was meant by the Commission itself to involve the need of inquiring in each instance how much of the variable daily time of "loaders" in the past or in the future was or would be spent in "unloading" and transferring freight between motor vehicles and between the vehicles and the warehouse as compared with the time spent inside the outgoing vehicles piling and stacking the freight.

The Commission itself in its own opinion in 28 M. C. C. 125 did not say that such time division is material in respect to those employees whose "sole" duties are those of "loaders" as defined by the Commission. It asserted power to the contrary.

5. The Second Circuit Court of Appeals abused any judicial discretion possessed by it under Rule 73(a) of the

Federal Rules of Civil Procedure in declining to dismiss the appeal since even that court stated in its opinion that only "feeble" excuses were given to it for not docketing the appeal and filing the record in that court until long after the time prescribed by Rule 73(g).

In this and other cases the Second Circuit Court of Appeals and several others are practically making a dead letter out of Rule 73(g). The Circuit Court of Appeals for the District of Columbia, back in 1940 (*Burke* v. *Canfield, et al.*, 111 Fed. (2d) 526) declared that while, under some circumstances, Rule 73(a) permits the appellate court to withhold dismissal for an "excusable" delay in docketing and filing of record, it further said:

> "We think it timely to advise the bar that we intend to exercise sparingly our discretion to save an appeal prosecuted in disregard of the rules. For notwithstanding the modern trend which we fully approve, it is desirable that courts and counsel bear in mind Justice Storey's admonition that 'infinite mischief has been produced by the facility of courts of justice in overlooking errors of form'."

Mr. Justice Rutledge, then a Circuit Judge, concurred.

Here in the present case, as in others coming before it from time to time, the Second Circuit Court of Appeals appears to consider that if an unperfected appeal appears to present "a substantial question" then the time limits of Rule 73(g) may be disregarded with impunity. In growing measure substantially the same point of view, as a mere matter of local practice, is developing elsewhere with some of the other circuit courts of appeal.

Clearly there would be no point in the Congressional enactment of Rule 73(g), intended to give successful litigants repose, if flagrant disregard of the prescribed limits of time for perfecting appeals depended on nothing more than the presence of "substantial questions" going to the merits of the cases. If it be granted that the Circuit Court of Appeals under Rule 73(a) possesses a reserve power to alleviate the consequences of "excusable" delay it should

not be the supposed possible or even probable merit of the case but whether the excuse for delay is "feeble" or "strong" that should govern the exercise of sound judicial discretion in regard to dismissal. Otherwise the prescription of time limits in Rule 73(g) would be meaningless.

ARGUMENT

Summary of Argument

Compressing somewhat for the purpose of argument the above statement of five questions presented certiorari should be granted for the reason that:

Point I

Important questions of Federal law are here more squarely presented than in the two other cases pending in the Supreme Court in which certiorari has been granted.

Point II

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is an invasion of the administrative authority of the Commission, it is contrary to the decision of the Interstate Commerce Commission reached in the exercise of its administrative authority, and it involves a collateral attack upon that decision.

Point III

The Second Circuit Court of Appeals erred in concluding that safety of motor carrier operations is not affected unless the amount of time devoted by workers engaged solely as "loaders" is substantial as to those variable portions of it which consist of piling and stacking freight in outgoing vehicles in connection with their other daily tasks as loaders. The Commission decided to the contrary.

Point IV

The refusal of the Second Circuit Court of Appeals to dismiss the appeal before it in the present case, notwithstanding the docketing and filing of the record with it were not timely, presents an important question of federal practice not heretofore decided by the Supreme Court and it is in direct conflict with decisions of the Court of Appeals for the District of Columbia and two other Circuit Courts of Appeal, it having here been concluded by the Second Circuit Court of Appeals that the excuses given for the delay in this present case were "feeble".

DISCUSSION

I

Important questions of Federal law are here more squarely presented than in the two other cases pending in the Supreme Court in which certiorari has been granted.

The provisions of Section 7 of the Fair Labor Standards Act do not apply to any employee of an interstate railroad, express company, pipe-line company, sleeping car company, or other common carrier subject to the provisions of Part I of the Interstate Commerce Act, including water carriers operating under common control, management, or arrangements for continuous carriage or shipment of freight between them and railroads. In terms Congress made the Fair Labor Standards Act in applicable to them *even though its separate legislation dealing with the prescription of maximum service hours of railroad employees was confined to those whose work affects safety and the Hours of Service Act does not apply at all to some of those other common carriers.* Employees of common carrier street and interurban electric railways are not covered by the Fair Labor Standards Act, nor are employees of airway carriers.

With respect to motor common and contract carriers the Interstate Commerce Act makes it the duty of the Com-

mission to prescribe the "qualifications" and maximum service hours of "employees". As to private motor carriers (defined in substance as manufacturers and distributors hauling their own goods by truck) the power of the Commission to fix the qualifications and maximum service hours of the employees of such industries was, properly, confined to those of their employees whose work affects safety of their motor truck operations. An appealing reason for the distinction arises from the fact that Congress did not wish to render the Fair Labor Standards Act inapplicable to *all* employees of industry who happen as private motor carriers to be hauling their own goods.

In the light of those respective and differing provisions fixing the Commission's power over the qualifications and service hours of employees of the several types of motor carriers along with employees of all other types of carriers, Congress, in the later Fair Labor Standards Act, made the provisions of Section 7 of that Act inapplicable to *such* of the employees of the three separate and different types of motor carriers whose qualifications and maximum hours of service the Commission is empowered to prescribe. At first reading that would, in analogy to common carriers subject to Part I of the Act, make Section 7 of the Fair Labor Standards Act inapplicable to *any* employees of motor common or contract carriers.

This court however in *U. S.* v. *American Trucking Associations, Inc.*, 310 U. S. 534, by bare majority vote, held that while the language used by Congress in the Interstate Commerce Act was not ambiguous nevertheless the Congressional intent, with respect to employees of common and contract motor carriers, like its intent with respect to private industries operating their own trucks, was to confine the Commission's power over their qualifications and hours of service to those whose work "affects" safety of operations.

Had a majority of the Supreme Court voted the other way in the case of *American Trucking Associations* and held that all employees of motor common and contract carriers for hire are within the control of the Commission and

hence exempt from the Fair Labor Standards Act, such a decision would have made the Congressional intent with respect to common and contract motor carrier employees at least consistent with its intent regarding the employees of all other forms of competing carriers such as air lines, railroads, water carriers, pipe lines, express companies, sleeping car companies, etc. In that event neither this nor the litigation in the *Comet Carriers* and *Spector Motor Service* cases would have arisen as to motor common and contract carriers.

But, since a majority of the Supreme Court, for reasons which were deemed sufficient, attributed to Congress the intent (not revealed by the words used in the statute) to put motor common and contract carriers into a different position than all their competitors that majority decision, unless reversed, now or later, is required to be taken as the starting point.

That majority decision brought within the purview of Section 7 of the Fair Labor Standards Act a substantial number of the employees of motor common and contract carriers (such as clerks, solicitors, watchmen, etc.), while their competitors remain outside. The Administrator of the Wage and Hour Division of the U. S. Department of Labor is now persisting, through his own "Bulletins", in agitating for further inroads into the Congressional exemption of motor common and contract carrier employees by introducing the wholly impracticable idea that of the remaining much greater number of employees, such as loaders, helpers, drivers, mechanics, etc., only those are to be exempt who devoted, out of their whole time, a "substantial" part of it, to those precise tasks which the judiciary (not the expert Interstate Commerce Commission) may think affects safety of operations. Those time percentages evolved by the Administrator have vacillated between 20 and 50 per cent of the worktime of the employees!

All of that newly attempted cutting down of the Congressional exemption springs from Administrator's wrongful assumption of the intent or effect of the majority decision in the *American Trucking Associations* case making the effect upon safety of operations the basis of ap-

plicability of the Fair Labor Standards Act to the regulated motor common carriers.

For the Supreme Court to uphold this present endeavor of the Administrator would be almost destructive of the motor carriers for hire industry. Many thousands of people are employed by the industry in labor categories the work of whom the Interstate Commerce Commission has determined affects safety of operations within its control such as loaders, helpers, drivers, mechanics, etc. The labor unions, the carriers, and all but a few of their employees have long acquiesced. It would be ruinous to that industry, already in a precarious financial position, now to hold it subject to a multitude of court judgments which in the aggregate would involve vast sums (running into millions) including the penalties and of course the hoped for attorneys' fees.

The Administrator is not, as to motor carrier employees, endowed with any administrative authority. The Interstate Commerce Commission is. It possesses definite administrative powers and duties in this particular field. The Administrator would no doubt have a standing to appear before the Commission; and he can agitate in other ways extremist points of view because of his peculiar concern to have the Fair Labor Act pushed to the limit of its possible application. The Interstate Commerce Commission is concerned with prescribing the qualifications and *limiting* the maximum service hours of motor carrier employees. The Administrator is concerned only that there be a deterrent against excessive hours of employees and a financial reward for them through collection of overtime rates of pay by those carrier employees not subject to the Commission's control. It is not his function, however, to determine who those non-exempt employees are.

The Second Circuit Court of Appeals has adopted extremist views regarding the coverage of the Fair Labor Standards Act not only in this but in other recent cases before it. In one the Supreme Court lately spoke of these problems as "not an exercise in scholastic logic" wherein the Second Circuit Court of Appeals had undertaken to work out and apply its "percentage" theory of statutory application (*10 East 40th Street Building, Inc.* v. *Callus*, decided June 11, 1945).

To the extent of what the majority of the Supreme Court actually decided the *American Trucking Association's* case the Administrator of the Wage and Hour Division is at least warranted in pointing to the fact that not all motor carrier employees but only those whose work affects safety of operations are outside the reach of the statute with which alone he is concerned. But a number of consequences and questions have flowed from that majority decision of the Supreme Court. They are presented by the situation involved in the present case and in those of *Comet Carriers* and *Spector Motor Service*.

Indubitably as the first consequence there became invested in the Commission the distinctive administrative function of initially and primarily utilizing, on the basis of public hearings, its expert judgment and thereupon concluding *which* categories of common and contract motor carrier employees perform tasks which in that judgment of the Commission *would* affect safety of operations. The later decision of this Court in *Missel* v. *Overnight Transportation Co.*, 316 U. S. 572, did not qualify that broad consequence and meaning of the decision in the *American Trucking Associations* case. The holding in the case of *Missel* v. *Overnight Transportation Co.* simply was that since, by the time that case had reached the Supreme Court, the Commission *itself* had already determined the work of "clerks" employed by motor common carriers did *not* substantially affect safety of operations, Missel was entitled to maintan a damage action under the Fair Labor Standards Act for unpaid overtime compensation. The Supreme Court there indicated its own view that manifestly the decision of the Commission as to clerks was correct.

But another important consequence followed the underlying concept of the majority decision in the *American Trucking Associatin's* case. Nothing in the legislation of Congress plainly adjusted or accommodated the exercise of primary administrative authority by the Commission under the statute which it administers and the judicial authority under Sections 7 and 16 of the Fair Labor Standards Act as applied to motor carrier employees. If the

majority decision in the *American Trucking Association's* case is to be adhered to there now exists need further to fashion, presently by judicial determination, the practical means of reconcilation between the two statutes.

Essentially, it would appear, the object of this court has been to bring up and resolve this important matter when it issued certiorari in *Levinson* v. *Spector Motor Service* and later in *Comet Carriers* v. *Walling*. The present case, however, more directly involves and invites solution of the problem than does either of those other two. Here, unlike the case of *Comet Carriers*, the suing employees are agreed to have worked exclusively in interstate commerce. Here, unlike *Levinson* v. *Spector Motor Service*, the work of the suing employees consisted "solely" of that of loaders and a helper within the very context and definitions of the Interstate Commerce Commission's own assertion of power over those categories. (28 M. C. C. 125). Here, unlike either of those other two cases, the Circuit Court of Appeals has first arrived at its own independent conclusion that only when, of all the time spent by persons employed solely as loaders, that which may be spent by them in piling and stacking freight in outgoing vehicles is shown to be "substantial", should recovery under the Fair Labor Standards Act be denied. Then, as if to support its own conclusion in that regard, the Second Circuit Court of Appeals has erroneously culled from its context certain language used by the Commission itself in 28 M. C. C. 125, and attributed to it concurrence by the Commission in the court's erroneous point of view.

This, then, is the best of the three cases in which the Supreme Court may reach the core of the whole problem, both procedurally and on the merits. Here, free of any complications, there is presented the most sharply the important nation-wide questions and their dependent consequences which seemingly induced the Supreme Court to issue certiorari in the *Spector* and *Comet Carriers* cases.

II

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is an invasion of the administrative function of the Commission, it is contrary to the decision of the Interstate Commerce Commission reached in the exercise of its administrative authority, and it therefore involves a collateral attack upon that decision.

These three propositions are now elementary: (1) the field of administrative responsibility which is vested in the Interstate Commerce Commission may not be invaded by the judiciary; (2) the validity of what the Commission does may be inquired into by the judiciary only when a direct review action is brought against the United States before a statutory three-judge court; and (3) in no form of judicial proceeding, to which the United States is not a party, may there be collaterally drawn into question the rightness of the Commission's determinations.

When purporting to exercise or not to exercise its administrative authority over the qualifications and maximum service hours of motor carrier employees the established system of three-judge statutory court review of the Commission's determinations applies. (*U. S.* v. *American Trucking Associations, supra*). Congress has not consented to a suit involving the validity of the Commission's determinations except in that form of direct proceeding and to which the United States must be a party. (*Venner* v. *Michigan Cent. R. Co.*, 271 U. S. 127; *State of Texas* v. *I. C. C.*, 258 U. S. 158; *North Dakota ex rel. Lemke* v. *C. & N. W. R. Co.*, 257 U. S. 485; *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377).

From that premise the Supreme Court has further reasoned and declared with emphasis that the validity of the Commission's administrative determinations may not be tested in a collateral proceeding to which the United States is not a party:

> "As before indicated, the United States is made by statute a necessary party to a suit to set aside an

> order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature" (*Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493).

In the later case of *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377, the rule was again stated and applied. In that litigation a coal company had brought suit in a State court to enforce the railroad tariff rules governing the distribution of coal cars in times of car shortage. Upon removal to the United States District Court and the filing of railroad answer and motion it became evident that the railroad tariff rule was itself only a reflection of what the Interstate Commerce Commission had previously determined in a general service order what should be the rule for railroad coal car distribution. Nevertheless the Circuit Court of Appeals undertook, in that action only between the shipper and carrier, to pass upon the enforceable character of the Commission's prescription. The Supreme Court of the United States reversed with direction that the action should be dismissed for want of jurisdiction. In the course of its opinion the Supreme Court there said:

> "The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was *in effect* sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three Judges. * * * The fact that this was a suit to set aside an order of the Commission *did not appear on the face of the bill;* but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (Italics supplied.)

Here, in a judicial proceeding having on its face only the form of a suit for damages under the Fair Labor Stand-

ards Act, the Second Circuit Court of Appeals, as if separately so authorized so to do, has undertaken either to invade the administrative field occupied by the Commission or in any event to collaterally review the rightness of what the Commission has done. That court, first without any reference to what the Commission may have decided, approached the case as if there were presented to it a judicial question (rather than administrative) as to whether or not it was shown of record that the work of the suing employees affected safety of motor carrier operations. That court, of its own volition, and not on any sort of record fully developing facts that would be pertinent in an administrative proceeding, resolved that safety of operations is affected only by so much of the work of those engaged solely as loaders or helpers as may involve respectively their riding the trucks or their standing inside outgoing truck vehicles piling and stowing the freight.

But that was the very task imposed upon the administrative authority—the Interstate Commerce Commission, according to the decision of the Supreme Court in *U. S. v. American Trucking Associations, Inc.*, supra. There may be, of course, extreme cases in which so very obviously no part of the work of a motor carrier employee could possibly affect safety of operations (such for instance as that of a freight solicitor) that no administrative problem would be involved. In that respect the situation would be analogous to the dealing with railroad freight tariffs in suits for overcharges. The Supreme Court in *Great Northern Ry. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285, drew such a distinction. It there was held that while the meaning of railroad freight tariffs, like other written instruments, might in some instances present only a judicial question yet when the subject of controversy is one involving the meaning of technical terms in the complex field of tariffs for transportation, an administrative problem is presented and an original judicial action for overcharges will not lie. That decision was elaborated in *Standard Oil Co.* v. *U. S.*, 283 U. S. 235 and *W. P. Brown & Sons Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393.

The Supreme Court has been moving with certainty toward the objective of assuring that at all times it be the administrative agencies and not the judiciary which shall primarily (under suitable methods of judicial review) occupy the field when there are presented complex matters calling for expert determinations on ample records and within the competency of those bodies to decide. As late as January 14, 1946, in *Order of Railway Conductors* v. *Pitney, et al., Trustees,* the Supreme Court restated and applied this broad philosophy of Government to a controversy arising under Section 6 of the Railway Labor Act where the Adjustment Board provided for in that Act had not yet functioned in the matter. In disallowing to the United States District Court who had appointed the railway trustees the right to decide the controversy the Supreme Court said:

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. * * * Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to assure compliance with the statute."

The need for national unification of tariff interpretations is no greater than the need for unification in the administration of the Commission's authority over the qualifications and maximum service hours of motor carrier employees. There is intensity of competition between motor carriers and between them and railroads and motor carriers which caused enactment of the National Transportation Policy to compose the struggle in the public interest to the end of preventing destructive competition. (*Eastern Central Motor Carriers Asso.* v. *U. S.*, 321 U. S. 194). It would therefore not do to leave each of the state or United States District Courts free to do so, nor to impose upon them the intricate and involved duty of measuring, in each particular case of a suing employee, the *degree* to which the several

component parts of his work may have affected in the past, or would in the future affect, safety of operations. The statute itself says nothing about "substantial". No legislative yardstick of the sort has been prescribed. Nor is the situation here like that of need to accommodate, under sound constitutional principles of comity, conflicts between State and Federal authority arising when it is claimed that State action has imposed upon interstate commerce a "substantial burden". (*State of Florida* v. *U. S.*, 282 U. S. 194).

There cannot be attributed to Congress, as a consequence of the majority decision in *United States* v. *American Trucking Associations, supra,* the intent that all the various State courts and United States District Courts as well as the Interstate Commerce Commission should be free individually to find out what kinds of work and how much of it affect safety of operations when performed by employees of motor carriers. Either the Commission or the courts must occupy the field. There is no precedent for concurrent authority in any other statute. That it should be the Commission which has the authority follows from the very intricate administrative nature of the inquiry and the need for national uniformity of determination. There is no room for compromise by judicially evolving and seeking to apply either a nebulous or arbitrary test of "substantiality of time" devoted by the employees having varied but related duties. That would only make bad matters worse and lead to hopeless confusion, uncertainty and variability of results as between the different types of employees and as between the competing motor carriers themselves. The National Transportation Policy could never be achieved under circumstances of that kind.

Nor could it have been the scheme of Congress to throw upon the overworked Supreme Court of the United States the added burden of bringing about the required competitive "national uniformity" which the practical necessity of the motor carrier industries would require in respect to qualifications and service hours of their employees whose work, other than that of some clerks and a small minority

of others, essentially involves tasks that affect safety of operations.

Judge Fee, the United States District Judge who presided at the trial of this present litigation, saturated his two opinions with full and carefully reasoned analysis of the essentially administrative character of the matters here being discussed. He emphasized the utter impracticability of throwing upon the judiciary a task of the nature proposed to this court.

But the Second Circuit Court of Appeals, even in its very approach to the case, has first essayed invasion of the Commission's own administrative function. There was no record before that court putting it in position to weigh with care all the facts pertinent to the question of what *parts* of their work and *how much* of the time of loaders and helpers affects safety of operations and what or how much does not. Indeed that court, in its reversal of the court below, held the Fair Labor Standards Act to be applicable here not because, as to these loaders, the court concluded the time devoted by them to stacking and stowing in outgoing vehicles was "insubstantial" *but because it had not been shown* in the agreed statement of facts to have been "substantial". One may well wonder, had the record shown (contrary to practical possibilities) the facts as to the variable portions of the times of the individual loaders years ago actually spent by each inside the outgoing vehicles each week by what authority would the Second Circuit Court of Appeals have arrived at its ultimate conclusion of the degree of "substantiality" or the lack of it deemed by it essential.

It is here necessary again to emphasize that the Second Circuit Court of Appeals first arrived at its result in the case without reference to anything which the Commission itself had already determined in the exercise of the administrative authority. It stated and applied its own test of substantiality without references to the views of the Commission. It did not, as even the District Court had done, say in effect that while the Commission's own decision seemed to have embraced these suing employees judg-

ment against them would be temporarily withheld to afford them the opportunity to go to the Commission for an informative explication. They could have done so had they so wished (*Schenley Distilleries Motor Division, Inc.* v. *U. S.*, Sup. Ct. of U. S., decided January 2, 1946). They refused and deliberately took the risk of judgment.

But in any event rightly read the Commission's determination in 28 M. C. C. 125 does not admit of the qualification which the Second Circuit Court of Appeals has undertaken to impose upon the Commission's authority. When this court, in the pending case of *Levinson* v. *Spector Motor Service*, invited the Interstate Commerce Commission to file with it a brief as amicus curiae, the Commission's counsel, in his brief, declared that "the views of the Commission", as shown in its report, are that the work of that class of motor carrier employees designated as "loaders" directly affects the safety of operations of the carriers' vehicles on on the highways. It is then said in that brief that the "rightness" of those "views of the Commission" would appear "hardly open to question". From that premise it is said to be "clear" that—

> "regardless of the amount of time devoted to the work of an individual loader he is expected to be fitted, and in fit condition, to perform it when the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service" (p. 27 of the I. C. C. brief).

As its controlling conclusion the Commission, in that brief of its counsel, urges—"It seems clear that, regardless of the amount of time devoted to the work by an individual loader" safety of operation requires that his qualifications and service hours be fixed by the Commission in accordance with the Commission's own determination of its authority.

From the standpoint of the Interstate Commerce Act itself the Solicitor General of the United States, in that same case of *Levinson* v. *Spector Motor Service*, also sup-

ports the views of the Commission. In his brief before the Supreme Court, also filed as *amicus curiae*, he says—

> "We agree with the construction of the Motor Carrier Act set forth in the brief amicus curiae being filed on behalf of the Interstate Commerce Commission. The Commission argues that if a person is engaged in operations relating to safety for any time at all it has some power over him and that this result is necessary if dangerous driving by tired drivers who work long hours and spend only a short time driving is to be avoided".

It is true that the Solicitor General goes on to say, however, that the rightness of that construction of the Interstate Commerce Act would create "consequences" under the Fair Labor Standards Act which the Solicitor General is "reluctant" to ignore. By that, seemingly, he means that the correct construction of the Interstate Commerce Act *ought* to yield to the desirability of allowing unqualified motor carrier employees to work excessive lengths of time in order that they might earn overtime pay and recover it, with damages, in court under the Fair Labor Act. The Solicitor General is "reluctant" to contemplate that the Commission's construction of the Interstate Commerce Act, which he concedes to be *correct*, would interfere with those recoveries.

It results, therefore, that the Second Circuit Court of Appeals in the present case has plainly engaged in a "collateral" attack upon the Commission's own determinations as to the scope of its power in relation to loaders and in which Commission determination seemingly the Solicitor General reluctantly acquiesces. But this sort of collateral attack is not something which the Second Circuit Court of Appeals or any of the United States District Courts or the state courts are permitted to make. If it be considered that there is fault in the Commission's views the proper direct action before a statutory reviewing court, on the record made before the Commission, would have to be instituted by any proper party in interest naming the United States as the defendant. And if, in such a direct

action, it were to be considered by the Supreme Court that the Commission's determination is either erroneous in law or indefinite and ambiguous or not supported by the record before the Commission or that the ultimate conclusions of the Commission lack sufficient explication the proper form of judicial decree is clearly indicated. (*Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493; *Eastern Central Motor Carriers Asso.* v. *U. S.*, 321 U. S. 194.)

The Second Circuit Court of Appeals should have upheld the dismissal of this action as had been adjudged by the United States District Court.

III

The Second Circuit Court of Appeals erred in concluding that safety of motor carrier operations is not affected unless the amount of time devoted by workers engaged solely as "loaders" is substantial as to those variable portions of it which consist of piling and stacking freight in outgoing vehicles in connection with their other daily tasks as loaders. The Commission decided to the contrary.

Both the trial court and the Court of Appeals in the present litigation, as well as the Commission, have all agreed that persons employed by motor common carriers as loaders perform work which affects safety of operations. On the full record before it in 28 M. C. C. 125 the Commission concluded that the proper stowing and stacking of freight in outgoing vehicles bears intimately upon safety of operations. It was further concluded by the Commission, on the record before it, that most of the larger motor common carriers employ separate crews or gangs of men whose "sole" duties are those of "loaders". In its description of their duties the Commission found as a fact that their work generally includes "unloading" in the mornings as well as "loading" in the afternoons. It further found as a fact that included within their duties as loaders is the handtrucking of freight from one of the truck vehicles to

another in the course of loading and unloading and that it also includes carrying by hand or handtrucks between the vehicles and the places to and from which the freight is picked up or laid down inside the buildings. In variable proportions of their time those same loaders, as to outgoing freight, stand inside the vehicles and do the stowing of the freight packages.

Not all members of a given gang would be inside the vehicles at a given time, especially when, as in the present case, there may also be inside the vehicles for the same purpose a "helper". Then, too, varying with the quantity and types of the freight, weather conditions and the times of day, first one of the gang and then another would be doing the work inside the vehicles while the others are carrying the packages by some means into or out of the truck terminals or into or out of the buildings in front or near which the trucks are standing such as in the congested Garment Center of New York City.

If, then, proper stowing and stacking of outgoing freight has an important bearing upon safety of operations, it is very evident that the Commission is right in its conclusion that those who perform such tasks should be physically and mentally qualified and they should not be left in position to work undue long hours merely for the sake of earning overtime pay or because they would otherwise be required to. The handtrucking of freight between the tailboards of trucks in either direction from or to the terminal platforms or inside the terminal buildings or between the trucks and the industrial buildings near which they are parked for loading and unloading, or from one building to another, is manual labor—often arduous. It is fatiguing. Rightly the Commission's view is that since it is a regular part of the duty of those engaged solely as loaders to do all or a part of the work of stacking and stowing in the vehicles a division of their variable time as between that task and the others which characteristically belong to loaders is not material nor practicable.

A man might spend fifteen hours handtrucking heavy packages of freight to and from the truck tailboards and then spend only thirty minutes inside the truck. But at that point of fatigue and mental letdown the hazard of allowing to him the function of properly stowing and stacking freight is the greatest.

Nor as a practical matter as the motor carrier industry is conducted could the Commission confine its prescription of qualifications and maximum service hours not to loaders, as such, but only in accordance with some stopwatch type of formula of apportionment of their time during any given week.

Beneath all that would still remain the question of how much time in proportion to the total work time of the employees should be deemed pertinent to be taken into account by any scholastic test of "substantiality" in each individual instance before it could be concluded whether the Fair Labor Standards Act or the Interstate Commerce Act would apply.

Nothing in the reported decision of the Commission negatives those considerations. When the Second Circuit Court of Appeals culled out of its context some of the Commission's language as if to the contrary it simply misconstrued the Commission's own decision. When in that decision reference was made to "substantial" time the context clearly shows that the Commission used the phrase in connection with categories of labor and not the experience of *individual* employees within the respective categories. That, at least as a matter of "power", the Commission was entitled to do.

Certiorari should be granted because of these important questions hereinbefore briefly discussed.

IV

The refusal of the Second Circuit Court of Appeals to dismiss the appeal before it in the present case, notwithstanding the docketing and filing of the record with it were not timely, presents an important question of Federal practice not heretofore decided by the Supreme Court and it is in direct conflict with decisions of the Court of Appeals for the District of Columbia and two other Circuit Courts of Appeal, it having here been concluded by the Second Circuit Court of Appeals that the excuses given for the delay in this present case were "feeble".

Perhaps ordinarily the Supreme Court would not grant certiorari when only a point of Federal practice may be involved. Here, however, is an important matter of Federal practice which seemingly calls for finality of determination by the Supreme Court to resolve a conflict of views between the different Circuit Courts of Appeal and to terminate a developing laxity of Rule enforcement.

The judgment of the U. S. District Court in the present case was entered February 19, 1945. Notice of appeal was then filed March 29 of that year.

Pursuant to Act of Congress of June 19, 1934; Chapter 651 (48 Stat. 1064) the Supreme Court of the United States adopted the "Rules of Civil Procedure for the District Courts of the United States". Rule 73(g) thereof provided that within 40 days after a notice of appeal from the District Court to the Circuit Court of Appeals the appeal shall be docketed and the record on appeal filed in the appellate court. If, *prior* to the expiration of that period of 40 days, the District Court, in its discretion may so determine, the time for docketing the appeal and filing the record on appeal may be extended by it but not to a day later than 90 days from the first notice of appeal.

After the expiration of that period of 40 days it is not within the authority of the District Court, either on motion

or otherwise, so to extend the time for completing the appeal, notwithstanding the provisions of Rule 6(b) which has to do with "enlargement" of times fixed for the doing of various things provided in the various Rules. (*Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. S.).)

But Rule 73(a) has been construed in those same cases to mean that nevertheless, in the exercise of a sound judicial discretion, the Circuit Courts of Appeal may or may not dismiss appeals to them when the docketing and filing of records with them shall not have occurred within the 40 day period after notices of appeal and no authorized extension of time had been granted by the District Courts.

The Second Circuit Court of Appeals, however, and several others of the appellate Federal courts, now seemingly regard the time limits fixed by Rule 73(g) as virtually meaningless. There is developing under their unduly liberal tolerance the practice of treating the 40-day limit with virtual unconcern merely because it may seem that, notwithstanding the lack of any proper excuse for the delays, the appeal may present what appears to be "substantial" questions.

Thus, as typical, in the present case the prescribed period of 40 days expired early in May, 1945. As said by the Second Circuit Court of Appeals in its opinion in this case thereafter—"Nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the District Court or this court until July 20."

On July 19, a Mr. Ramey (not attorney of record in the litigation) notified counsel for this Petitioner for Certiorari that the following afternoon he would present to a single Judge of the United States Circuit Court of Appeals for the Second Circuit "a motion for an order extending the time within which the plaintiff shall have to file in the office of the Clerk of the said Court the record on appeal herein".

Accompanying the notice was a copy of an affidavit of that Mr. Ramey, which he stated would be submtited to that individual Circuit Judge.(*)

On the afternoon of July 20, 1945, Hon. Augustus N. Hand, an individual member of the Second Circuit Court of Appeals, signed a purported order endeavoring to extend to the 1st day of September, 1945, the time for serving and filing the record on appeal. That purported order of Judge Hand was later filed in the District Court and a copy of it, certified by the Clerk of that Court, has been filed with the Clerk of the Supreme Court as a part of the record in these certiorari proceedings.

That purported order of Judge Hand declared that the motion was made before him and that his purported order was made "on reading the affidavit of Deane Ramey, sworn to the 19th day of July, 1945."

Therefore, from the date of the notice of appeal there elapsed nearly *4 months* before anything was done toward completing the appeal and at that time nothing more was done than to obtain a purported order of a single Judge of the Circuit Court of Appeals setting back an additional 40 days to as late as September 1, 1945, the filing date.

Upon the convening of the Circuit Court of Appeals for its fall term early in October counsel for the then appellee filed and argued before the membership of that court (three judges sitting) a motion to dismiss the appeal because of inexcusable dilatoriness. It was denied from the Bench with the mere observation of Hon. Learned Hand that the delay in docketing and filing of the record had no effect because, by then, they had in FACT occurred! Later, in connection with final submission of the cause, the dismissal motion was renewed.

(*) While recorded by the Clerk of the Circuit Court of Appeals for the Second Circuit neither the notice of motion nor its accompanying affidavit were taken into the files of either the appellate court or the District Court. Uncertified copies thereof are therefore attached hereto in the Appendix to this Petition for Certiorari.

In its eventual opinion in the case the appellate court, on this point of practice, first merely stated that there had been obtained from a single Judge of its court an extension order on July 20, 1945, giving until September 1. Then the Second Circuit Court of Appeals declared that the appellate court possesses discretion under Rule 73(a) to dismiss or allow a dilatory appellant to proceed.

The court in that opinion denied the renewed motion to dismiss, declaring that while the excuses given for the delay by an attorney not even an attorney of record were "feeble" dismissal would be refused only upon the stated ground that the appeal "presents a substantial question as to the correctness of the judgment".

That the excuses given for the delay in the affidavit of Mr. Ramey were "feeble" is self-apparent. His affidavit before Judge Hand claimed nothing more than that he (not the attorney of record) had experienced delay in getting the papers from Mr. Spielvogel, who was the attorney of record, that thereafter Mr. Ramey had experienced "stenographer troubles", and that whereas his partner, Mr. McKelvey, had supposed that Mr. Ramey was attending to the matter he, Mr. Ramey, had supposed that his partner was!

Not to dismiss the appeal under the circumstances was plainly contrary to the purposes of the Rules of Civil Procedure. Not only in this but in other cases the Second Circuit Court of Appeals, along with several others, seemingly attributes so little force to the time limits imposed by Rule 73(g) as to make a virtual dead-letter of those parts of that Rule and to make the matter of dismissal or non-dismissal dependent only upon whether the dilatory appeal proceedings seem to that court to "present a substantial question".

Even if it be true that some measure of judicial discretion is possessed under Rule 73(a) by the appellate court it is plain that a single Judge of that court, long after the expiration of the 40 day period has no function to perform in regard to extensions. The full court memberships, and not single Judges, declined dismissals in the cases herein-

above cited in this form of practice. Moreover even the terms of Rule 73(a) speak of "such action as the appellate *court* deems appropriate". That does not mean a single Judge of the appellate court.

So here, after the 40 day limit expired early in May, 1945, the case was docketed and the record filed in the appellate court not until September 1, or *nearly five months* after the notice of appeal. Here even that court, in its opinion, notes that the excuses given for the delay were not supplied by the attorney of record but by another lawyer whom the court itself described only as "of counsel". Those excuses the court properly said were "feeble". But because a "substantial question" as to the rightness of the judgment appeared to exist the Circuit Court of Appeals allowed the case to proceed without dismissal.

That view of its authority and duty puts the Second Circuit Court of Appeals in the position of saying (and such is its actual practice) that if it thinks a substantial question of the rightness of judgment may be presented then even "feeble" excuses for serious dilatoriness may and will be disregarded.

But successful litigants in the trial court are entitled to a reasonable measure of repose after a long lapse of time and seeming intention of the losers to default even after a notice of appeal. The proper test of the exercise of sound judicial discretion is the "excusability" of the delay even in the presence of a substantial question in the case. What would be deemed a type of good "excuse" is indicated in the three decisions hereinabove cited.

But as long ago as 1940 the Circuit Court of Appeals for the District of Columbia, when Mr. Justice Rutledge was a member, sounded a sharp note of warning to the bar that the reserved authority of the Federal Courts of Appeal to disregard dilatoriness should be "sparingly exercised" and only when sound judicial considerations would make it appear that the delays are "excusable". (*Burke* v. *Canfield, supra.*) Rule 73(g) (a rule of intended repose should not be made into a dead letter. When an action is

dismissed by the United States District Court and a perfunctory notice of appeal given the failure thereafter for a long period of time to follow up must be penalized regardless of the presence of a "substantial question" which was decided. When, as here, the attorney of record in such an action seemingly drops a case, and then later a stranger to the record bobs up nearly five months after the notice of appeal with his appeal papers and resists dismissal in the appellate court only upon the "feeble" excuses given by Mr. Ramey in this instance, a grave injustice will have been done this petitioner for certiorari by the action of the Second Circuit Court of Appeals in not dismissing.

It is believed that the time has come for the Supreme Court of the United States to reinstate the intended vitality of Rule 73(g) and to admonish the Second and any other Circuit Court of Appeals that feeble excuses will not suffice to prevent dismissals of appeals in which flagrant dilatoriness in docketing appeals and filing the appeal records has occurred. If the Supreme Court grants certiorari in this particular case on the first three grounds embodied in this petition it is respectfully urged that this particular ground be included as well because the time and occasion are at hand for the Supreme Court to speak on this subject of general importance to the courts, the bar and the public.

Respectfully,

CHARLES E. COTTERILL,
Counsel for Petitioner.

Appendix "A"

(Opinion of the Court below)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—October Term, 1945.

(Argued November 13, 1945 Decided December 28, 1945.)
Docket No. 19908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP.,

Defendant-Appellee.

Before:

L. HAND, SWAN and FRANK,

Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act of 1938, 29 USCA §201 *et seq.* From a judgment dismissing their complaint, 59 F. Supp. 341, the plaintiffs appeal. Reversed in part; affirmed in part.

LEON E. SPIELVOGEL, *Attorney for appellants;*
Ramey & McKelvey, of counsel.
CHARLES E. COTTERILL, *Attorney for appellees.*

SWAN, *Circuit Judge:*

This is an action under §16b of the Fair Labor Standards Act, 29 USCA §216(b), to recover unpaid overtime compensation, liquidated damages and attorney's fees. It was commenced in the City Court of the City of New York, was removed by the defendant to the District Court, and was tried to the court without a jury upon an agreed statement of facts. The plaintiffs are employees of the defendant, a common carrier by motor truck of interstate freight, and the issues framed for trial were whether they were within the coverage of section 7 of the Act, 29 USCA §207, or were exempted therefrom by section 13(b)(1), 29 USCA §213(b)(1), as employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of §304 of Title 49." Because of doubt on the basis of the agreed facts whether the plaintiffs were subject to the jurisdiction of the Interstate Commerce Commission, the trial judge was of the opinion that decision should be held in abeyance in order that they might have an opportunity to apply to the Commission to fix their status. *Ispass* v. *Pyramid Motor Freight Corp.*, 54 F. Supp. 565. Thereafter the plaintiffs moved for a final disposition of the case, and the trial judge, treating the motion as an election not to apply to the Commission or to present further pleadings or proof, entered an order dismissing the complaint. 59 F. Supp. 341. From this judgment the plaintiffs have appealed.

Before passing to the merits we consider the appellee's motion to dismiss the appeal. The judgment was entered February 19, 1945. Notice of appeal was duly filed March 29th, but nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the district court or this court until July 20th, when an order was obtained from a judge of this court extending the appellant's time to file the record on appeal until September 1, 1945. On that date the record and the appellants' brief were filed. A motion by the

appellee to dismiss the appeal was denied from the bench in October and is now renewed. It is urged that under Rule 73(g) F. R. C. P. only the district court possesses jurisdiction to extend the time to docket an appeal and file the record on appeal. But Rule 73(a) provides that a party may appeal by filing with the district court a notice of appeal and that failure of the appellant to take further steps "does not affect the validity of the appeal, but is ground * * * for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Hence the jurisdiction of the appellate court attaches at the time of filing the notice of appeal and whether a dilatory appellant shall be allowed to proceed is a matter within its discretion. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. C.). In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment. The motion to dismiss is denied.

In construing section 304(a)(1) and (2) of Title 49 the Supreme Court has limited the regulatory power of the Commission to those employees whose activities affect the safety of operation of motor vehicles. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 553. But it is the existence, not the exercise, of the power that determines their exemption under section 213(b)(1) of Title 29. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. In *Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, the Commission ruled that "loaders" and "helpers", as well as drivers, of motor trucks are subject to its jurisdiction, because the way a truck is loaded affects the safety of its operation. The appellants contend that their activities bring them within this ruling. We must therefore consider the evidence, bearing in mind that the burden of proof is upon the defendant to show which, if any, of its employees

are within the exemption. *Helliwell v. Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Walling* v. *Comet Carriers*, 151 F. 2d 107, 110 (C. C. A. 2); *cf. Stratton* v. *Farmers Produce Co.*, F. 2d 825, 827 (C. C. A. 8).

Laying aside for the moment the case of the plaintiff Shapiro, the agreed statement as to the other plaintiffs is to the following effect: The defendant maintains a main terminal on West 11th Street and a sub-terminal on West 38th Street for the convenience of its customers in the Garment Center of New York City. In the case of north-bound (*i.e.*, incoming) trucks, as the helper on the truck pushes the freight packages over the tailboard they are received by the plaintiffs, who place them in the sub-terminal building, and later in the day deliver them to the various consignees by means of hand-trucks or flat trucks which they push. Sometimes the north-bound trucks by-pass the sub-terminal and stop along the curb in the Garment Center; in such cases the unloading is performed in the same manner as at the sub-terminal and the plaintiffs then deliver the packages by hand or hand-truck into the buildings in the Garment Center. In the case of south-bound (*i.e.*, out-going) trucks, some of the freight packages are picked up by the plaintiffs at the consignors' places of business and hand-trucked to the sub-terminal where the plaintiffs "physically load the freight packages into a waiting truck" which proceeds, when loaded, to the main terminal where a new driver is taken on for the journey to destinations south of New York. A down-town employee other than the plaintiffs' also takes part in loading the vehicles at the sub-terminal. Sometimes trucks for south-bound loadings take up stations on the public streets in the Garment Center where the plaintiffs bring the packages by hand or hand-truck; in such cases the part taken by the plaintiffs in loading consists in lifting the packages to the tailboard "and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with

the down-town employee, stack and pile the freight in the vehicle." All of the plaintiffs other than Shapiro generally walked between stopping points but occasionally in order to save time, rode upon the truck when it moved from one place to another in the Garment Center.

It seems clear that the unloading activities of the plaintiffs would not bring them within the jurisdiction of the Commission because after the down-town helper pushes the packages over the tailboard their effect upon the safety of operation of the truck ceases. On the other hand the plaintiffs' part in loading the trucks does concern safety of operation. Merely lifting the packages on to the tailboard may not; but when they stand inside the truck body and help the down-town employee to "stack and pile the freight in the vehicle," they act as "loaders" and would come within the Commission's jurisdiction if these duties occupied a substantial part of their time. In 28 M. C. C. at 131 the Commission said that "we *have concluded that* we should not assert jurisdiction as to employees who spend an unsubstantial part of their time in performing duties which affect the safety of operation of motor vehicles." It is not clear whether the Commission thought it lacked power to assert jurisdiction or in the exercise of discretion refused to assert power. We think the former is the correct view. See *Walling* v. *Comet Carriers*, 151 F. 2d 107, 111 (C. C. A. 2); *Levinson* v. *Spector Motor Service*, 389 Ill. 466, cert. granted 14 U. S. Law Week 3126. Upon this record the defendant has not carried the burden of showing that "loading" occupies a substantial part of the working time of the plaintiffs. Accordingly the judgment of dismissal must be reversed and the cause remanded for entry of judgment in their favor and for allowance of an attorney's fee.

As to Shapiro the stipulation states that he regularly and as a matter of fixed duty rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the main terminal. In

addition Shapiro devoted three and a half hours daily to inside office work at the sub-terminal. Since Shapiro rode the truck for a substantial part of his working time he is a "helper" within the Commission's ruling in 28 M. C. C. at pp. 135-6. As to him the judgment of dismissal is affirmed.

As to the other plaintiffs the judgment is reversed and the cause remanded. An allowance of $200 is awarded to the plaintiffs' attorney for services on the appeal.

Appendix "B"

Stipulation of Facts

Order

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Civil No. 20-145

[SAME TITLE]

Upon reading and filing the annexed consent of the attorneys for the respective parties hereto, it is

ORDERED that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I. That this is an action brought under, and by virtue of, the Fair Labor Standards Act, 1938, 29 U. S. C. A., sections 201-219.

II. The complaint contains six causes of action for wages alleged to be due plaintiffs from defendant. The complaint was subsequently amended by an order, based on a stipulation, to include the causes of action of two additional plaintiffs.

III. The defendant was engaged in "commerce", within the purview of section 3 of the Act.

IV. The plaintiffs were engaged in "commerce" or in the "production of goods for commerce" within the purview of section 3 of the Act.

V. The defendant did not pay the plaintiff any overtime compensation.

VI. The parties have entered into the following stipulation of facts which have been agreed to be the facts upon which this action is based:

"The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:

Item 1: The defendant is a common carrier of property for hire by a motor vehicle in interstate and foreign commerce. It operates approximately 190 motor vehicles. Its principal operations are those between Wilmington, Delaware, and Philadelphia on the South and New York City and the Metropolitan New York District on the North. It is so authorized to operate by the Interstate Commerce Commission under a certificate of public convenience and necessity. It is privileged to transport what are termed "commodities generally."

Item 2: The defendant's main terminal in New York City is on West 11th Street, Manhattan Island. For the purpose of better serving its numerous customers in what is known as the Garment Center of New York City, it has long maintained a sub-terminal at 323 West 38th Street at which northbound freight for delivery in the Garment Center has been brought and southbound freight originating in the Garment Center leaves.

Item 3: As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown helpers rode on the vehicles with the drivers to the 38th Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. As the downtown helper pushed the freight packages over the tailboards they were received by the plaintiffs, who then placed the freight packages in the sub-terminal building. Still later in the mornings the plaintiffs then delivered the packages to various consignees in the Garment Center, generally using for that

purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

During those same days other northbound trucks after first stopping at the West 11th Street main terminal to change a driver and receive a downtown helper, by-passed the West 38th Street sub-terminal and parked first at one place and then another alongside the curbs in the Garment Center. At those pl[illegible]s the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.

Item 4: In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was "picked up" for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: Some of the freight packages would be picked up by the plaintiffs at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs would also at the same time so load the vehicles.

Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs brought the packages by hand or by hand truck. The part which the plaintiffs took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

Item 5: As to all the plaintiffs other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal.

Item 6: For the purposes of this case and for this case only it is agreed that the work period of each plaintiff each week was 54 hours, except as to plaintiff Shapiro, whose work hours, it is agreed, was 58, in consideration of which each was employed at a fixed weekly wage.

It is further agreed that the foregoing constitutes a description of the entire duties of the plaintiffs."

VII. The hours worked by the plaintiffs and their regular weekly compensation are as shown in Exhibits 1-8 inclusive.

VIII. It is agreed that if the plaintiffs are entitled to recover, a reasonable attorney's fee shall be fixed by the Court.

IX. It is agreed that if plaintiffs are entitled to recover for overtime claimed due, plaintiffs are also entitled to recover double said amount as liquidated damages, in accordance with section 16 (b) of the Wage and Hour Act.

IT IS FURTHER ORDERED that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I. Plaintiffs contend that they are covered by the Fair Labor Standards Act of 1938, and particularly by section 7 (a) thereof.

II. Defendant contends that plaintiffs are not covered by the Act and are specifically exempt from the provisions of section 7 (a) by section 13 (b) (1) thereof.

This issue involves a mixed question of law and fact to be determined at the trial.

It is agreed by counsel for both parties and by the Court that the decisions of the Interstate Commerce Commission and the Interpretive Bulletins and other rulings of the Administrator under the Fair Labor Standards Act are not binding upon the Court, but shall be considered by the Court in the determination of the issues raised herein; the Court to give such rulings the consideration required of them by law.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

ORDERED that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 29th day of April, 1943.

JAMES ALGER FEE
U. S. D. J.

Notice of settlement of foregoing order is hereby waived, and consent to signing same is hereby made.

Dated: April 29, 1943.

(Sgd.) LEON E. SPIELVOGEL,
Attorney for Plaintiffs.

(Sgd.) CHARLES E. COTTERILL,
Attorney for Defendant.

Appendix "C"

Notice of Motion and Affidavit

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants,

against

PYRAMID MOTOR FREIGHT CORPORATION,

Defendant-Respondent.

SIR:

PLEASE TAKE NOTICE that upon the hereto annexed affidavit of DEANE RAMEY, sworn to the 19th day of July, 1945, and upon all other proceedings heretofore had herein, the undersigned will apply to one of the Judges of the Circuit Court of Appeals for the Second Circuit, at the Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1945 at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order extending the time within which the plaintiffs shall have to file in the office of

the Clerk of the said Court, the Record on Appeal herein, and for such other, further and different relief as to the said Court may seem just.

Dated: New York, July 19th, 1945.

Yours, &c.,

LEON E. SPIELVOGEL,
Attorney for Plaintiffs-Appellants
RAMEY & MCKELVEY,
of Counsel,
Office & P. O. Address,
501 Fifth Avenue,
Borough of Manhattan,
New York 17, N. Y.

To:

CHARLES E. COTTERILL, ESQ.,
Attorney for Defendant-
Respondent,
70 East 45th Street,
New York, N. Y.

Affidavit of Deane Ramey, Read in Support of Motion

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Plaintiffs-Appellants

against

PYRAMID MOTOR FREIGHT CORPORATION,

Defendant-Respondent

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

DEANE RAMEY, being duly sworn, deposes and says:

That I am a member of the firm of RAMEY & MCKELVEY, appearing herein of counsel to LEON E. SPIELVOGEL, ESQ., the attorney of record for plaintiffs-appellants, and submit this affidavit in support of the within application that an order be made and entered herein, extending the appellants' time within which to perfect and file in this Court, the Record on Appeal by plaintiffs-appellants, from an order dated February 14, 1945, by HON. JAMES ALGER FEE, a United States District Judge for the District of Oregon, and filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 19th day of February, 1945, dismissing the complaint herein.

The action involved in this appeal, and which was originally commenced in the City Court of the City of New

York, County of New York, by the plaintiffs to recover from the defendant overtime wages and compensation under and pursuant to the provisions of the Fair Labor Standards Act of 1938, was, upon the petition of the defendant removed to the United States District Court for the Southern District of New York, after which time, and on or about the 21st day of April, 1943 it regularly came on for trial in the said United States District Court for the Southern District of New York before the said Hon. James Alger Fee, a visiting Judge from the District of Oregon, who was then sitting within this jurisdiction.

When the said action came on for trial as aforesaid, the Trial Court instead of proceeding with the matter in the regular prescribed course and hearing testimony in support of the allegations of the complaint and answer, either directed or suggested that the attorneys for the respective parties prepare and submit to the Court a stipulation setting forth an agreed statement of facts for use by the Court in reaching a determination as to the issues raised by the pleadings. This was done, and the said attorneys thereupon duly executed and submitted to Judge Fee a stipulation setting forth all of the facts and issues involved and which were substantially to the effect that the defendant, which is a domestic corporation, was engaged in business as a common carrier of property for hire by motor vehicles in intrastate and foreign commerce, and that in connection with its business it maintained its main terminal on West 11th Street, in the Borough of Manhattan, New York, N. Y. and a sub-terminal in the Garment Center at New York, N. Y.

The plaintiffs were employed by the defendant in the capacity of "push-cart boys" and their duties consisted primarily of meeting the defendant's trucks at its sub-terminal, receiving packages which had been transported by the defendant in interstate commerce, and thereafter and by means of hand trucks, delivering the same to the divers consignees of said packages. In addition thereto,

the plaintiffs picked up from divers manufacturers in the Garment Center, other parcels consigned to out-of-state consignees and likewise by the use of hand trucks delivered them to the defendant's trucks at its said sub-terminal.

In addition to the foregoing and among other things, the stipulation set forth an agreed statement of facts regarding the hours of employment and fixed the amount of the overtime wages to be paid to plaintiffs in the event the Trial Court decided that they were covered by the Fair Labor Standards Act.

This stipulation and the pleadings were thereupon submitted to the said Trial Judge who thereupon proceeded to reach a determination of the issues involved without any proof of any kind being offered, and thereafter and on or about the 29th day of November, 1943, Judge Fee wrote and filed a lengthy opinion which was to the effect that, inasmuch as the defendant was a motor carrier and under the jurisdiction of the Interstate Commerce Commission, the plaintiffs should be required to file with the Commission an application seeking a determination of their status as employees of the defendant, and a ruling to the effect that they either were, or were not under the jurisdiction of the Commission. The opinion fruther provided that the action was to be held open pending such application and determination.

Thereafter Mr. Spielvogel retained my firm as of counsel in the matter, and we immediately proceeded to take the matter up with Judge Fee by letter, due to the fact that he had returned to his home jurisdiction. After several letters had been exchanged between my office and Judge Fee, during the course of which I definitely indicated that the plaintiffs did not feel that the responsibility was theirs to seek a ruling before the Commission, and that they felt that they were entitled to a decision by the Court without such application, I caused a motion to be brought on before the United States District Court for the Southern District of New York on November 28th, 1944, whereby I

sought a final determination of the action based upon the papers which had been submitted to Judge Fee. The said Motion was referred to Judge Fee, who thereafter and on the 14th day of February, 1945 signed the said order above referred to dismissing the complaint. Thereafter, and on the 2nd day of April, 1945 I caused an appeal from the said order to be filed in the office of the Clerk of the United States District Court for the Southern District of New York. I then telephoned Charles E. Cotterill, Esq., the attorney for the defendant and asked him if he would enter into a stipulation settling the Record on Appeal. Mr. Cotterill stated to me that he would not enter into a stipulation of any kind, neither would he exchange any favors or courtesies as far as this particular case was concerned, and that in addition thereto he would place in my path every obstacle at his command. He made it very emphatic at the time that he was opposed to any further discussion of any kind regarding the matter, and asked me to refrain from any further request as far as the record on appeal was concerned. Following this telephone conversation, and on the 8th day of April, 1945, I served upon Mr. Cotterill a notice, pursuant to Rule 75 of the Federal Rules of Civil Procedure, setting forth and designating the papers and records which the plaintiffs intended to print and file with this Court as the Record on Appeal. On April 11, 1945 Mr. Cotterill served upon me a cross notice, which listed as a part of the Record on Appeal, the correspondence which I had conducted with Judge Fee as above referred to, as well as letters which he had written and another letter written by the Regional Attorney for the Wage and Hour Division. I did not feel that these letters constituted a part of the Record on Appeal, and I thereupon, and on the 24th day of April, 1945 caused a motion to be brought in the United States District Court for the Southern District of New York, for an order settling the Record on Appeal. This said Motion came on before Judge Clancy, who entertained some doubt as to the power

of the District Court to grant such a motion, and upon his suggestion I withdrew the said motion and took the matter up with the Clerk of this Court as to the method of procedure in view of Mr. Cotterill's refusal to stipulate as to the Record on Appeal, or extend any courtesy whatever in the matter. I was thereupon informed that in view of Mr. Cotterill's actions, it would be necessary for me to prepare and submit to the District Court typewritten copies of all the papers on file and obtain a certification thereof, and file same with the Clerk of this Court.

I immediately proceeded to follow these instructions, but I discovered that the file which Mr. Spielvogel turned over to me was incomplete and that a number of papers which were on file in the District Court were not delivered to me by Mr. Spielvogel. It thereupon became necessary to make long-hand copies of the said papers on file, and then have them typewritten for a proof reading and certification by the District Court. Without any fault or negligence on my part, or on the part of the plaintiffs, I encountered considerable inconvenience and delay in preparing such record. The delay in question was occasioned by reason of the time element involved in making the hand-written copies, and a further delay was caused due to the fact that after the complete record had been typed, a considerable portion or part thereof was inadvertently mislaid or lost, thereby necessitating a repetition of the work which had already been done. In addition to the foregoing, additional delay was occasioned by reason of the fact that my stenographer's Mother died while she was in the midst of preparing the record for a second time. This occurrence caused her to be absent from the office for a considerable period of time, and it became necessary for me to get someone else to do this work.

I finally succeeded in getting the typewritten copy prepared, and when I submitted it to the Clerk of the District Court on July 18, 1945 for certification, I was informed that the time within which to file the Record on Appeal had ex-

pired and that same had not been extended by stipulation, order, or otherwise. This information came as a surprise to me for the reason that I was under the impression that my partner and associate, to wit, Willian McKelvey, who has likewise actively participated in this case since we were retained, had applied to and obtained from the District Court an extension of time. I then questioned Mr. McKelvey about the failure to obtain such extension, and he stated that he was of the opinion that I had obtained such an extension. The only thing to which I can attribute this misunderstanding is the fact that during the time in question we were having some difficulty as far as Secretaries were concerned, and it became necessary to change them at short intervals. The failure to obtain such extension was purely inadvertent, and it has not in any manner whatever prejudiced the rights of the defendant. The plaintiffs have been aggrieved by the order herein appealed from, and I feel reasonably certain that such order will be reversed by this Court when the matter is formally presented.

In dismissing the complaint the Trial Court was in error, for the reason that it imposed upon the plaintiffs the obligation of proving that they did not come within the exemption provisions of the Fair Labor Standards Act, instead of imposing such duty upon the defendant.

As before stated, the typewritten record is now ready for certification by the District Court, and I am prepared to have the Record on Appeal printed and filed in this Court and prosecute the said appeal without further delay. I again repeat that the defendant has not been prejudiced, and greater harm and injury will result to the plaintiffs by the denial of this application than to the defendant by the granting of same.

That no previous application for the relief herein asked for has been made to any Court or Judge thereof.

WHEREFORE I pray that an order be made and entered herein, extending the time within which the plaintiffs may

file the Record on Appeal in the office of the Clerk of this Court, and I further ask that the period of such extension be fixed so as to afford the plaintiffs adequate opportunity of filing such record.

DEANE RAMEY

Sworn to before me this
19th day of July, 1945.
HYMAN W. SOBELL, Notary Public
N. Y. Co. Clk's No. 761, Reg. No. 1490-S-7
Kings Co. Clk's No. 202, Reg. No. 1027-S-7
Bronx Co. Clk's No. 114, Reg. No. 522-S-7
Commission Expires March 30, 1947

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

BRIEF IN BEHALF OF PETITIONER

CHARLES E. COTTERILL,
70 East 45th Street,
New York, N. Y.,
Attorney for Petitioner.

October 4, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 41

PYRAMID MOTOR FREIGHT CORP.,
Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,
Respondents.

BRIEF IN BEHALF OF PETITIONER

Petitioner, Pyramid Motor Freight Corp., is an interstate motor truck common carrier of general property for compensation operating over highways between New York City, on the north, and Philadelphia, on the south. It was sued in the City Court of the City of New York by certain of its former employees for claimed unpaid overtime compensation, liquidated damages, and counsel fees, because of asserted violations of Section 7 of the Fair Labor Standards Act by the petitioner employer.

The action was removed by the employer to the United States District Court for the Southern District of New York which, on February 14, 1945 (Rec. 51), after two

opinions (Rec. 31 and 45) dismissed the action as to all the suing employees. (Reported in 54 Fed. Supp. 565 and 59 Fed. Supp. 341.)

On belated appeal proceedings to it the United States Circuit Court of Appeals for the 2nd Circuit, on December 28, 1945 sustained the judgment of dismissal as to one of the former employees (Shapiro) but reversed as to the others (Rec. 68). Its decision is reported in 152 Fed. 2d 619.

This Court, on March 25, 1946, granted certiorari to the 2nd Circuit Court of Appeals with respect to each of the grounds theretofore presented to it in the Petition for Certiorari filed in this Court by the petitioner employer (Rec. 70).

A statement of the facts and the issues concerning the claim of violation of Section 7 of the Fair Labor Standards Act is delayed in this brief for petitioner because at the threshold of the case it is necessary first to conclude whether the Circuit Court of Appeals erred in failing to dismiss the appeal to it for non-observance of Rule 73 (a) (g) of the Federal Rules of Civil Procedure.

I

The Circuit Court of Appeals erred in not dismissing the appeal to it on the ground that without recognizable excuse the appeal was not docketed with it nor the transcript of record filed with it until long after the expiration of time permitted by Rule 73(g) of the Federal Rules of Civil Procedure.

Rule 73(g) of the Federal Rules of Civil Procedure requires that within 40 days of a "notice of appeal" in the District Court the would-be appellant must docket his appeal in the Circuit Court of Appeals and file therein within that time the record on appeal. The District Judge may, within that period of 40 days, extend to a total of 90

days the time within which docketing of the appeal and filing of the record may occur.(*)

Rule 73(a) in substance provides that a party may appeal from a judgment by filing with the District Court a "notice of appeal". It then further states that failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not of itself affect the validity of the appeal but, when no other remedy is specified in the Rule, is ground for such action as the appellate court deems appropriate which "may" include dismissal of the appeal.(**)

Here, in this action, while notice of appeal was promptly given in the District Court by the attorney of record soon after entry of judgment, *nearly five months elapsed before the appeal was docketed in the Circuit Court of Appeals or the record on appeal filed therein. The District Court did*

(*) "*Docketing and Record on Appeal.* The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." (Rule 73(g)).

(**) (a) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal but is ground only for such remedies as are specified in this rule, or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. (Rule 73(a)).

not, within 40 days of the date of notice of appeal, extend or have before it an application to extend the time.

From the Bench the Court of Appeals, without opinion, denied a separate motion to dismiss the appeal (R. 63). Upon renewal of the motion for dismissal the Circuit Court of Appeals held that the appeal was not dismissable (R. 65) because it presented "substantial questions" even though the excuse for the delay of docketing and filing of the record was "feeble".(*)

Here then, the 2nd Circuit Court of Appeals has virtually emasculated the right to repose afforded successful litigants in the District Courts by an assumption of authority to entertain belated appeal proceedings undertaken without semblance of regard to the time requirements of Rule 73(a), (g) of the Federal Rules of Civil Procedure. The attitude of the 2nd Circuit Court of Appeals in this case is that it will not dismiss, under Rule 73(a), an appeal regardless of the delay of docketing and filing of record with it and even though the excuse for the delay be "feeble", if it appears to that court that "substantial questions" as to the rightness of the judgment of the District Court on the merits are present.

The declination to dismiss was not based upon the amount of the delay. It was not based upon a showing of sufficiency of excuse for the delay. Instead that court put aside all the time limit requirements of Rule 73(g) and the lack of proper excuse for the delay and looked only to see if a "substantial question" was presented by the belated appeal.

As a consequence would-be appellants would now be both allowed and encouraged to pay no attention to the

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(*) The notice of appeal was served March 29, 1945.
Forty days therefrom expired May 8, 1945.
July 19, 1945, a single judge of the Circuit Court of Appeals undertook to extend the time to September 1, 1945.
The appeal was docketed and the record on appeal filed approximately September 1, 1945.

time limits of Rule 73(g) and to depend hereafter only upon a substantial claim of error in the judgment of the District Court. Since, of course, they would not prevail anway in the Court of Appeals unless they demonstrated error in the judgment no risk would be run by those would-be appellants in simply ignoring Rule 73(g) as to the time for docketing their appeals and filing their records. The 2nd Court of Appeals says it will look only to see whether there is involved a substantial question of error in the judgment and not the time of docketing and filing of the record or the reason for the delay.

That view of the 2nd Circuit Court of Appeals, unless reversed in this case, would revolutionize Federal appellate practice throughout the country and virtually destroy the repose to successful litigants which Rule 73(g) was designed to assure.

The view of the Circuit Court of Appeals concerning its duty under Rule 73(a) is completely out of harmony with the view of other circuit courts of appeal on the same question. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n.* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. S.); *U. S.* v. *Gallagher*, 151 F. 2d 556. In those decisions not the slightest encouragement was given to the idea that the penalty of dismissal would be withheld, regardless of non-compliance with Rule 73(g), merely because, had the appeal been perfected in time, it would have been deemed that a good case for reversal of the District Court on the merits existed. On the contrary: in each of those cases, without reference to the merits of the judgment of the District Court, the Circuit Court of Appeals inquired only whether the delay in perfecting the appeal was due to "excusable" or "non-excusable" causes. In the *Ainsworth*, *Mutual Benefit* and *Burke* cases it was concluded that there had been shown to the appellate court sound and substantial reasons for the delay. In *U. S.* v. *Gallagher*, supra, however, the appeal was dismissed be-

cause of the delay, it having been determined by the Court of Appeals that no justifiable showing by way of excuse for the delay itself had been made. Whether the appeal otherwise would have had merit was not even considered.

Two members of the United States Supreme Court (the Chief Justice and Mr. Justice Rutledge) participated in the decision of the Court of Appeals for the District of Columbia in *Burke* v. *Canfield*, supra. In that decision that court of appeals warned the bar that the reserved authority "to save an appeal" prosecuted in disregard of Rule 73(g) "would be exercised sparingly" and only for good cause shown in the way of "excusable" delay.

The 2nd Circuit Court of Appeals here finds that the excuse given for the delay was "feeble". That was putting it mildly. What apparently took place was that after serving his notice of appeal the attorney of record in the District Court virtually abandoned the case. Months afterwards (on July 19, 1945) an entirely different attorney (Mr. Ramey) appeared on the scene before a single judge of the 2nd Circuit Court of Appeals with his affidavit in support of a request to that single judge to fix a still later date for docketing the appeal and filing the record (Rec. 53).

The gist of that representation was that the original attorney of record had engaged Mr. Ramey to be "his" attorney but after having done so very greatly delayed turning over all the papers in the case to Mr. Ramey. Then, it seems, according to the affidavit, Mr. Ramey had "stenographer trouble". To cap the climax it was further said in the affidavit that Mr. Ramey thought his partner (Mr. McKelvey) was attending to the appeal while Mr. McKelvey thought Mr. Ramey was! (See copy of that affidavit attached to petition for certiorari, page 51.) To call that recital of excuse for delay only "feeble" was gentle, especially since previously Mr. Ramey had been denounced in this action by Judge Fee for having been guilty of conduct toward him "virtually bordering on contempt". (Rec. 49).

When Mr. Ramey approached that single judge of the 2nd Circuit Court of Appeals the time limit under Rule 73(g) had already long since expired. But apart from that: when the time limits of Rule 73(g) have been ignored no single judge of a Circuit Court of Appeals may thereafter, with or without an affidavit, fix a still later date for docketing and filing of record. Rightly the Court of Appeals in *U. S.* v. *Gallagher, supra*, recently so held. Even when, under Rule 73(a), it could be determined that the delay was "excusable," the action to be taken by the Appellate Court would have to be by the court itself—not by only a single member.

If, therefore, the Supreme Court of the United States concludes that in this instance the 2nd Circuit Court of Appeals clearly abused its judicial discretion in failing to dismiss and has unwarrantably confused the meaning of and proper practice under the Rules of Civil Procedure, reversal upon that ground is due and further consideration of this action by the Supreme Court would then be unnecessary.

II

The Circuit Court of Appeals erred in the conclusion of law that there is a judicial rather than an administrative question involved in determining whether the work of employees of interstate motor carriers affects safety of operations.

Three years before the Fair Labor Standards Act was passed by Congress the Interstate Commerce Commission, in Paragraphs 1, 2, and 3 of Section 304 of the United States Code of Laws, Title 49, was given authority to establish "reasonable requirements" with respect to "qualifications and maximum hours of service of employees" of three kinds of interstate motor carriers—common, contract, and private. As to employees of private motor carriers, the statute in

terms limited the Commission's authority in that regard to those employees whose work affects safety of operation of motor carriers. As to employees of common and contract motor carriers the statute authorized the prescription of reasonable requirements as to qualifications and maximum service hours of "employees". Nevertheless this Court, five years later, by closely divided vote, concluded that the Commission's authority with respect to qualifications and maximum service hours of interstate motor common and contract carriers extended only to those whose work affects safety of operations (*U. S.* v. *American Trucking Associations, Inc.*, 310 U. S. 534).

It appears too late now for the motor carrier industry to bring that decision again under review although it is here permissible to call to attention that the decision of the Supreme Court was rendered May 27, 1940, more than two years after passage of the Fair Labor Standards Act. Yet in the Fair Labor Standards Act its overtime provisions in Section 207 have no application whatsoever *to any other type of public transportation agencies!*

When passed in 1938 Section 213(b) of the Fair Labor Standards Act caused Section 207 of that Act not to apply to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49".

That choice of language by Congress in 1938, when enacting the Fair Labor Standards Act, was appropriate to the purpose (if such was the purpose) of leaving out from Section 207 of the Fair Labor Act all employees of motor common or contract carriers (like all employees of all other transportation agencies) while leaving out only those employees of private carriers those whose work affects safety of motor vehicle operations. As private carriers consist of shippers (engaged in production or distribution) owning or operating their own trucks the exemption of the Fair Labor Act properly should have been confined to those employees of industries whose work concerns safety of

truck operations. But as common and contract carriers are directly competitive with all other forms of transportation it has not seemed to this industry that Congress would have intentionally discriminated against it in favor of all other forms of transportation in subjecting some of its employees to Section 207 of the Fair Labor Act while leaving out all employees of all other types of transportation agencies.

However that may be the starting point in the present action apparently must be that the administrative authority of the Interstate Commerce Commission over the qualifications and maximum service hours of employees of motor common and contract carriers extends to those whose duties affect safety of operations and does not extend to those whose duties do not affect safety of operations. The exemption from Section 207 of the Fair Labor Standards Act exists or does not exist accordingly.

At once the question is precipitated as to who is to make the determination of which work categories affect safety of truck operations and which do not. The apparatus of administration of the exemption in Section 213(b) of the Fair Labor Act is not legislatively indicated.

Here, in the present action, the Circuit Court of Appeals seemingly has drawn to the judiciary the making of the determination. That, it is believed, is a fundamental error.

Had the Fair Labor Act never been passed it would not have been seriously questioned in any quarter that if the effect upon safety of vehicular operation properly should be the test of the authority of the Interstate Commerce Commission it would be initially the administrative duty of that Commission to make the determination. If, correctly, that Commission is to prescribe the qualifications and maximum service hours of those motor carrier employees whose work it deems affects safety, is it not an inherent administrative function of that Commission initially to determine which employee categories fall to the one side or the other of the line? Naturally its administrative determination would not be absolutely final and conclusive because, like any other order of the Commission, statutory court review of that

kind of order (whether affirmative or negative in form) would be proper. (*U. S.* v. *American Trucking Associations, Inc.*, supra.)

Yet here, because certain former employees of Pyramid Motor Freight Corporation sued in court to recover under Section 207 of the Fair Labor Act, the 2nd Circuit Court of Appeals appears to consider that it is a judicial function to determine whether or not the work of those suing employees affected in "substantial" measure the safety of truck operations.

It would seem clear that the subject matter cannot at one and the same time be administrative and judicial. When *Missel* v. *Overnight Transportation Co.*, 316 U. S. 527, was decided by this Court the Commission had already determined that the work of clerical employees did not affect safety of operations. This Court, in its opinion, so noted. It did not independently resolve the question as a judicial function. Later in *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, this Court concluded that since the Commission had determined that the work of drivers of trucks would affect safety of operations that circumstance alone was enough to defeat the damage recovery action by suing employees even though the Commission had not yet actually exercised the power possessed by it. This Court did not independently determine whether or not the work of truck drivers affected safety.

Were it to be a judicial function, in an action under the Fair Labor Act, to determine whether the character of work performed affected safety of operations it could be urged just as plausibly that the courts could answer the question in the affirmative (although the Commission may have answered it in the negative) as the reverse. If, however, it be the duty of the courts, in actions under the Fair Labor Act, to observe and be controlled by the Commission's own administrative determinations, then it would clearly follow that if, in a given instance, the Commission had not thus far made the administrative determination, it would be the

duty of the Commission and not the court to make it. Certainly that would appear to be so in anything resembling a "border line" case calling for highly expert technical experience and judgment.

Conceivably there could arise individual situations so very clearly on one side of the dividing line that a court, in an original action before it under the Fair Labor Act, could say that beyond peradventure of doubt the involved work category was completely remote from safety of operations and that therefore no administrative question could possibly be involved. But short of those possible extreme cases it would seem that ordinarily there is need to apply by close analogy the same rule governing division between the judicial and administrative authority which has long since been worked out by this Court in other situations where the expert investigatory administrative functions of the Commission and other administrative agencies were emphasized and deemed so important that necessarily the subject matter was taken to have been removed from the field of primary judicial concern. Of the numerous decided cases covering this broad ground the following are typical:

Great Northern R. R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285;

Standard Oil Co. v. *U. S.*, 283 U. S. 235;

W. P. Brown & Sons v. *L. & N. R. R. Co.*, 299 U. S. 393;

Order of Ry. Conductors v. *Pitney, etc.*, (Sup. Ct. U. S.) decided Jan. 14, 1946.

District Judge Fee in the present case, in his first opinion (Rec. 31), expressed the conviction that the work of the suing employees was so "closely akin" to that of employee categories whose work the Commission already had determined affected safety as to cause him to consider that probably at that time he should dismiss the suit. But perhaps because of the influence of this Court's decision in *American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308

U. S. 422, he at first in that opinion temporarily withheld judgment of dismissal for a reasonable time to allow the suing employees, if they so wished, to go before the Interstate Commerce Commission for an administrative determination of their status. It was not until long thereafter, when their purported counsel categorically refused, that Judge Fee, in his second opinion, determined finally upon dismissal (Rec. 45). It was during the interval between the two opinions that Mr. Ramey, in a succession of letters to Judge Fee, so berated the District Court as to cause Judge Fee to denounce the conduct of Mr. Ramey as "virtually bordering on contempt." (Rec. 49).

It might well be, then, that when a damage recovery suit is brought under the Fair Labor Act to the judiciary the first point of inquiry should be whether or not it appears that the work category into which the plaintiffs fall is one as to which the Interstate Commerce Commission has or has not determined, as an administrative body, whether work of the kind performed by them affects safety of operations. If so, then of course such a suit should be dismissed. If it should appear to such a court that the particular work category has *not* been so dealt with either way by the Commission, but yet there are present factual elements which provoke the need for expert administrative determination, the procedural course blocked out in the *El Dorado* case could well be adopted. In that way there could be accomplished the needed accommodation between the judicial and administrative functions. If, however, it appears that by no possibility could the involved work affect safety, then the court could proceed on its own to final judgment.

But at least it seems certain that in the present case the Circuit Court of Appeals clearly transcended its proper authority when undertaking, as it did, to draw to the judiciary the very complex and complicated task of determining in what way and to what extent the work of the suing employees affected safety of operations. The subject matter does not lend itself to categorical treatment on the basis of individual determinations. The motor carrier

industry is a vast one. It employs over a million people. Inevitably the determination of the relationship to safety of carrier operations must proceed along somewhat broad lines of work categories without subtle refinements and qualifications. The treatment should not be "scholastic". To enter upon a meticulous inquiry as to the hours and minutes of any given day or week spent by individuals in a particular work category in the doing of those precise things which bear the most intimately upon safety, would be nearly impossible and if possible at all would introduce so many elements of doubt, uncertainty, competitive inequalities and variabilities from week to week as to disenable successful conduct of the business.

With respect to railroad employees the Interstate Commerce Commission has a similar authority to prescribe maximum service hours for those whose work the Commission deems affects safety and there follow certain consequences when railroads fail to comply with the Commission's directions. Railroad telegraphers are deemed by the Commission to perform work of a character which concerns safety of railroad operations. But not all railroad telegraphers spend all of each of their working hours at the keys. They do much paper work. Often they handle freight. They have considerable amounts of idle time watchfully waiting but doing no actual labor. Would it be a proper judicial function to say that while, as a category, railroad telegraphers perform work affecting safety but that unless a particular railroad telegrapher devotes 20 per cent or more of his time actually manipulating the keys or transcribing incoming messages then that his work does not affect safety?

So, too, here: did not the 2nd Circuit Court of Appeals err in the assumption of authority to introduce its own idea as to how much of their time in the course of a given week the work of those engaged solely as truck "loaders" must consist only of standing *inside* trucks actually stacking and piling the freight in *outgoing* vehicles (proof of which it said should be offered by the employer, going back

over six or more years) and that if it be less than 20 per cent. of all the weekly work of truck "loaders" their work does not "affect" safety of operations?

The judiciary is not well equipped to deal with those sorts of problems. Their determination calls for industry-wide investigation and conclusion. It calls for expertness in the peculiar field of transportation and especially the intricate field of the motor truck industry. Safety of persons upon the highways as well as the men employed by the companies compels a much broader base of understanding and treatment than can be achieved in the catch-as-catch-can experience of an individual court trial of a damage suit.

III

In any event in the present case the Court of Appeals erred in the failure to understand correctly the meaning of the Commission's own previous determination that the work of "loaders", as a category, affects safety of operations regardless of the time spent inside the vehicles.

As to the employees who sued in this particular case the facts were agreed (Rec. 24). Pyramid Motor Freight Corp. has its main terminal in New York City on West 11th Street. There the larger part of its merchandise freight comes in during the early mornings, it is then unloaded from the road vehicles into the terminal (some of it into the terminal warehouses), later in the morning much of it is reloaded into city vehicles, and then again unloaded from those city vehicles into industry and office buildings near which the vehicles are parked. In the late afternoons the Company employees go into the city buildings and bring out the freight packages to the parked truck vehicles which, when filled, then go to the main terminal on 11th Street where the freight is unloaded from those vehicles and thereafter reloaded into road vehicles which go southward to or in the direction of Philadelphia.

The garment center of New York City is, however, a concentrated area of extremely high freight traffic density and presents peculiar and difficult street and other traffic problems. To serve its patrons in that particular small area the company located a sub-terminal near the middle of it. Northbound from Philadelphia and intermediate places the road vehicles would come during the early hours of the mornings first to the main terminal on 11th Street. There a change of vehicle crews occurred and the vehicles, without there being unloaded, resumed their journeys to the sub-terminal in the garment center. At that place the work was variable. Often the contents of those vehicles would be unloaded in the sub-terminal and later in the morning delivered by hand or handtruck to the nearby loft buildings. At other times those truck vehicles would park along the city streets in the garment center where the unloading operations and delivery direct into the buildings occurred.

Late in the afternoons the outgoing freight packages would be taken out of the loft buildings and loaded into the parked trucks, which then would go their way or the freight would be taken to the sub-terminal and there loaded or further loaded for their direct outbound journeys.

Like any other loaders the employees here suing did the loading and unloading work at the sub-terminal or into and out of the parked vehicles in the garment center. Their work, in kind, corresponded precisely to that of loaders at the main terminal. It differed only in the respect that the loading of the truck vehicles was generally direct from the loft buildings (but sometimes from the sub-terminal) and so was the unloading but sometimes at the sub-terminal.

Necessarily not all the members of these crews of loaders always stood inside of the truck vehicles actually stowing and stacking the outgoing freight. Their daily work consisted of both loading and unloading. Furthermore, as at the main terminals of nearly all motor truck companies not all members of the loader gangs would stand inside the truck vehicles at one time. They would rotate,

one or two putting inside the truck vehicles and the others placing the packages on the tailboards. Those who might be inside the vehicles one day would not be the next.

Both the District Court and the 2nd Circuit Court of Appeals appear to have concurred in the view that the work of these suing employees (other than Shapiro who was a helper) was so "closely akin" to that of loaders at the main terminals as to come within all the purposes of the Interstate Commerce Commission when, in *Re Maximum Hours*, 28 M. C. C. 125, it determined the work of "loaders" to affect safety of operations. There the Commission said:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are *to load and unload motor vehicles and transfer freight between motor vehicles and between vehicles and the warehouse.*" (Italics supplied).

Substitute the word "building" for "warehouse" and the Commission's description of the work of "loaders" precisely fits that of the suing employees at petitioner's sub-terminal or on the city streets.

The Commission well knew that men employed "solely" as "loaders" also engage in *unloading* and that the time so spent (about one-half) does not affect safety of operations. So, too, the Commission well knew that the tasks of loaders are not confined to the standing inside of the *outgoing* vehicles piling and stacking. It knew (and so said) that their work includes also time spent in "hand trucking" from one vehicle to another *and between vehicles and warehouses.* Those different but related tasks are all components of the work of "loaders". But the Commission was not guided by the thought and most certainly did not intimate that even though a man be employed solely as a loader only that part of his time spent inside an

outgoing truck stacking and piling would have to be determined and measured in its proportion to the whole of his task as a loader, next that it would be necessary to arrive at some arbitrary percentage as if warranted by the law and in that way conclude whether safety of operations calls for the Commission's prescription of their mental and physical qualifications and the maximum hours of time to be devoted by them to their several intimately related tasks.

Here, however, the 2nd Circuit Court of Appeals has wrongly attributed to the Commission exactly that strange intent. It reads the Commission's opinion as saying that there are two broad divisions of motor carrier employees—those the nature of whose work "substantially" affects safety of operations and those whose work does not. From that interpretation the court proceeds to arrive at an impression (quite erroneous) that the Commission meant no more than to identify the different work categories falling into those two broad divisions. The court says that while the Commission determined that those work categories consisting of "drivers", "loaders", "helpers" and "mechanics" were deemed by it substantially to affect safety of operations yet that the Commission meant thereby to leave it open for the judiciary to inquire as to the component parts of the daily work of those employees and to break it down into percentages according to which the Commission's authority existed or did not with respect to each *individual* employee in those respective categories.

It is respectfully submitted that the Commission meant nothing of the kind. It has never said that the work of railroad telegraphers affects safety of operations only when 20 per cent of some other arbitrary percent of their time is spent in working the keys or receiving messages. Nor has it ever said that the work of truck loaders affects safety of operations only when as much as 20 per cent or some other arbitrary percentage of their time is spent inside truck vehicles stowing and stacking outgoing freight. The court simply misunderstood the Commission's ad-

ministrative determination. The test of "substantiality" was applied by the Commission, and meant by it to be applied, only in respect to work categories as a whole—not to the components of the work of each individual in the respective categories.

That determination of the Commission is capable of direct statutory court review. It is not, however, capable of addition or subtraction or a frittering away by the judicial process of refinement and qualification never envisaged by the Commission itself. That would be in substance a "collateral attack" on the Commission's own administrative action and may not occur. (*Wenner* v. *Michigan Cent. R. Co.*, 271 U. S. 127; *State of Texas* v. *I. C. C.*, 258 U. S. 158; *North Dakota ex rel. Lemke* v. *C. and N. W. R. Co.*, 257 U. S. 485; *Lambert Run Coal Co.* v. *B. and O. R. Co.*, 258 U. S. 377; *Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493.)

If, at a small railway station, the agent operates the telegraph keys along with his other varied duties, including much paper work and actual freight handling, are not the maximum hours of his daily labor (of all kinds) and his qualifications important even though only 20 per cent of his time may be spent at the telegraph keys? Would not a tired-out railroad employee likely err in judgment at a critical moment whether his fatigue came from long hours of paper work, or freight-handling, rather than long hours at the keys? Similarly as to truck loaders: the critical part of their work as bearing upon safety of operations is chiefly the stowing and stacking of freight in the outgoing vehicles. But it is then that clarity of thinking and the exercise of sound judgment is called for. Can it be immaterial to safety of operations what their maximum service hours are to be and what are their physical and mental qualifications simply because in the course of a given day the time consumed by them in hand-trucking between the platforms and buildings (whether terminal or industrial) or from one truck to another, or in unloading as distinguished from loading may account for 80 per cent of the whole?

At any rate are not these administrative questions; and did not the Commission, in its report in 28 M. C. C. 125, reveal its whole thought when, in respect to "helpers", it said:

> "We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. *An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continual controversy.* They will be included in the category of helpers". (Italics supplied).

Properly the 2nd Circuit Court of Appeals in the present case should have determined that the Commission already had administratively passed upon the work of "loaders" with full knowledge of its different component parts and the variability of time devoted to each; that properly the Commission had concluded not to be governed by those proportions of time when dealing with employees whose work consisted solely of that of being "loaders" as defined by the Commission; and that consequently this suit should be dismissed. In any event the problem was administrative, not judicial, even if the Commission had not already dealt with it.

IV

The matter of burden of proof

Proceeding from its faulty premises as to its own authority and as to what the Commission had held or not held the 2nd Circuit Court of Appeals in the present action appears to have considered that there therefore rested upon the Pyramid Motor Freight Corp. a burden of proof to

show that during each week over a term of nearly six years each of the suing employees spent as much as or more than 20 per cent of his working time inside truck vehicles stowing and stacking outgoing freight. From any point of view a burden of that kind would be impossible for an employer to sustain. Employees engaged as loaders do not have uniformity of time each day or each week in the performance of their intimately related component tasks as loaders. They naturally have not kept time records of those variables. Nor of course did the employees keep any. The general rule regarding the "burden of proof" is that the required information must come from the person in best position to furnish it. Certainly the employer in a situation of this kind never would be in a position to know the facts. To throw upon the employer any such burden in the motor truck industry would be equivalent to holding that Section 213 of the Fair Labor Act is meaningless.

Conclusion

The judgment of the Circuit Court of Appeals as to all the respondents other than Shapiro should be reversed and the judgment of the United States District Court affirmed.

Respectfully,

CHARLES E. COTTERILL,
70 East 45th Street,
New York, N. Y.
Attorney for Petitioner.

October 4, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

vs.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

REPLY BRIEF IN BEHALF OF PETITIONER

CHARLES E. COTTERILL,
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New York, N. Y.,
Attorney for Petitioner.

October 18, 1946.

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IN THE

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No. 41

PYRAMID MOTOR FREIGHT CORP.,
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MURRAY LSPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,
Respondents.

REPLY BRIEF IN BEHALF OF PETITIONER

There has been received from counsel for the respondents a brief in their behalf. There has also been received from the Solicitor General of the United States a brief on behalf of the Administrator of the Wage and Hour Administrator, United States Department of Labor as *amicus curiae* which the Solicitor General states he authorized to be filed with this Court.

To both documents this short reply is respectfully tendered:

I

The work category of respondents

In this action the United States District Court concluded that the work of the respondents substantially fell into the category of "loaders" as the term was used and was meant to be used by the Interstate Commerce Commission. The Second Circuit Court of Appeals similarly viewed the respondents as coming within the work category of "loaders". From his background of experience the Administrator of the Wage and Hour Division, with even greater positiveness, speaks of the respondents as "loaders" and does not question that their work fitted the pattern of the category or "loaders" as meant to be described by the Commission. Therefore both the trial court and the appellate court and now the Wage and Hour Administrator all concur in the position that the Supreme Court of the United States should deal with the legal questions involved on the basis of that factual determination.

Counsel for the respondents, however, in amazing disregard of the stipulation of facts, in their brief before this Court, would have it understood that the respondents were not loaders at all. They would have this Court disregard the stipulation of facts and instead gather from their brief alone that the respondents were "push cart boys" whose work almost entirely consisted of handtrucking freight packages in the garment center of New York City only between the petitioner's sub-terminal and loft buildings throughout that area. They would have it thought that the loading and unloading was seldom done direct between the parked trucks on the city streets and the nearby buildings by the respondents in this action. They would have it understood that the respondents almost never entered the trucks, only very *rarely* doing so when certain particular packages might be so heavy that they would assist some one else inside the truck.

The stipulation of facts will speak for itself to the contrary of those suggestions. The endeavor of new counsel for the respondents to manufacture an entirely different case by mere assertions of their own as to the governing facts will not mislead this Court.

II

The Administrator of the Wage and Hour Division and the respondents are making a collateral attack on the administrative conclusions of the Interstate Commerce Commission.

This Court will properly understand that in the discharge of his functions it is the regular course of the Administrator of the Wage and Hour Division to institute injunction proceedings to prevent what he deems to be continued violations of the Fair Labor Standards Act. Likewise it is his course to intervene quite frequently when damage actions are brought by employees under that Act for claimed overtime compensations. It is also understood by this Court that through bulletins and other activities the Administrator stimulates the institution of such actions on legal theories espoused by him. In consequence his theories frequently find presentation to the trial courts and not infrequently acceptance by them, state and federal, scattered throughout the country.

The issue here between him and the Interstate Commerce Commission is obvious and finds illustration in a number of trial court decisions he cites. He takes the position that either the Commission should never have determined that truck loaders perform work affecting safety of operations or that in any event out of the component and related parts of their tasks of handling freight as loaders only a portion of it is of such nature that safety of operations would be affected. He accepts the fact to be that the Commission on its part considers that since one of the important components of the work of loaders does directly

affect safety the Commission is authorized by statute to prescribe the maximum hours of the entire work of loaders. Candidly making those concessions the Administrator questions the rightness of the Commission's view. He says in substance that in point of time, i. e., percentages of time, that part of the work of truck loaders which consists of the standing inside *outgoing* trucks in the piling and stacking of the freight shipments is the only part of their work which affects safety and that it is relatively small in point of time as compared with the total time devoted by loaders in the performance of all their related component tasks. Those related tasks consist of "unloading" and also the hand-trucking of freight between the tailboards of trucks, on the one hand, and warehouse or other buildings or other trucks, on the other. Introducing the thought that the relative time percentages should govern his ultimate contention is that as a general rule not enough is devoted to the piling and stacking of freight inside outgoing truck vehicles, relative to the total time devoted to other components of the work as loaders, to affect safety for the purpose of exemption from the Fair Labor Standards Act. He urges upon this Court a comprehensive decision to that effect. The 2nd Circuit Court of Appeals in the present case accepted his point of view.

In a situation of this kind, where there is an evident head-on collision between two different agencies of the United States Government, employers of motor carrier labor cannot, in a proceeding such as this, do more than to emphasize that what the Administrator seeks to do, both through his activities in District Court cases and now before this Court, is to launch his indirect *collateral* attack upon the Commission's determinations. This, it is submitted, is the underlying error of his thinking and of the thinking of the 2nd Circuit Court of Appeals and various of the District Courts in similar situations.

The Commission has made its determination, whether right or wrong, and unless and until it shall be directly reviewed and set aside it is binding. That it is capable of

direct review in a statutory court decision having before it the record made before the Commission is obvious. (*Eldorado Oil Works* v. *United States*, decided by this Court April 22, 1946, No. 428, October Term, 1945). In such a review proceeding the Interstate Commerce Commission would be named either as a defendant or it would be entitled under the reviewing statute directly to intervene. The case would be in charge of the Attorney General of the United States. The record made before the Commission would be before the courts.

Unless and until such direct review action shall be brought and the point of view of the Administrator sustained the law of any case such as this is fixed by action of the Commission. When the Commission determined, rightly or wrongly, that a given work category included performance of laborious tasks which affect safety of operations, even though accounting for only a portion of the time of the work of loaders, that conclusion of the Commission is binding on the courts in any action instituted under the Wage and Hour statute. No one appears to have questioned that that is so when the work of truck "drivers" may be involved. In dismissing actions for claimed overtime pay instituted by drivers of trucks the courts have not independently concluded for themselves whether the work of drivers affects safety. They have deemed themselves to be controlled by the single circumstance that the Interstate Commerce Commission has administratively decided the question and that its decision has not been directly reviewed and set aside.

No different rule is available to the Administrator, or those whom he assists in the institution and prosecution of their damage actions, because the work category involved may not be that of drivers but might be that of mechanics or loaders, etc. It is as much the duty of the courts to respect the administrative conclusion of the Commission in regard to loaders and mechanics as it is in regard to drivers.

The candor of the Adminstrator is refreshing. He directly challenges the rightness of the Commission's views

in regard to loaders. The trial courts and the 2nd Circuit Court of Appeals, not because of any lack of candor but because of a misunderstanding on their part, have supposed that they are free to whittle down and emasculate the Commission's administrative determinations with regard to loaders and mechanics by introducing the "percentage" of time theory. But no less is that a collateral attack on the Commission's administrative functions than is the more obvious challenge now proposed to this Court by the Administrator himself.

III.

Delay in Docketing and Filing of the Record.

Counsel for the respondents say in their brief that the "Court" (the 2nd Circuit Court of Appeals) late in July, 1945, "extended his time for docketing the appeal and filing his record. It is further said that counsel for the petitioner did not object.

Both statements are inexcusably erroneous. More than three months after the original notice of appeal the present counsel for respondents went to a *single judge* of the Court of Appeals for an extension and obtained from him an order purporting to grant it. Not only did counsel for the petitioner protest to that judge the taking of any such action but it is now decided by the Circuit Court of Appeals for the 9th Circuit that no such order would be "valid". That Court said:

> "On May 31, 1945, appellant moved for and obtained from a judge of this court an order purporting to extend the time for filing the record to June 16, 1945; but, having been made after the expiration of the period for filing as previously extended, the order of May 31, 1945, was invalid and ineffective. The record was filed here on June 14, 1945—14 days late.

For Appellant's failure to comply with Rules 73(g), 75(a) and 75(d) no excuse is shown. The failure does not affect the validity of the appeal, but is ground for such action as we deem appropriate. The action we deem appropriate is dismissal of the appeal." (*U. S.* v. *Gallagher*, 151 F. (2d) 556.)

Here the delay was not 14 days but close to *four months*. Even the 2nd Circuit Court of Appeals declared the purported excuse for the delay was "feeble". The action required to be taken plainly was one of dismissal of the appeal.

Conclusion

It is respectfully urged that the judgment of the court below as to all but Shapiro should be reversed and the judgment of the District Court affirmed.

Respectfully,

CHARLES E. COTTERILL,
70 East 45th Street,
New York, N. Y.
Attorney for Petitioner.

October 18, 1946.

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FILED
MAR 9, 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. [redacted] 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

—*vs.*—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANDRITH and JOSEPH GANNON,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN W. SCOTT,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1945

No. 821

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

—vs.—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLI.., LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary Statement of Facts and Proceedings

This matter in which certiorari is sought, came before the Circuit Court of Appeals, Second Circuit, on appeal from a judgment of the United States District Court for the Southern District of New York, dismissing the complaint in an action which was commenced by the respondents under and pursuant to the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act) to recover from the petitioner unpaid overtime wages.

The answer which the petitioner interposed to the complaint (R. 24-26) contained an affirmative defense to the effect that the respondents were exempt from the provisions of the Act for the reason that the services which they performed for the petitioner consisted of those of loaders' and drivers' helpers (R. 26).

When the action was called to trial, the attorneys for the respective parties prepared and submitted to the Trial Court, an order (R. 34-44) which framed the issues and set forth an agreed statement of facts substantially as follows:

1. The petitioner (a New York Corporation) was engaged in business as a common carrier of property for hire by motor vehicles in interstate and foreign commerce. It operated approximately 190 motor trucks between the cities of Wilmington, Delaware; Philadelphia, Pennsylvania and New York, New York, under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 35).

2. Petitioner's main terminal was located at West 11th Street, New York City, and it likewise maintained a subterminal in the Garment District, at premises 322 West 38th Street, New York City, to and from which freight consigned and originating in that district was shipped and delivered (R. 35).

3. Trucks carrying freight shipped from points outside of New York and intended for delivery therein, were driven to the petitioner's main terminal where new drivers and helpers took over the trucks and drove them to the 38th Street sub-terminal. Upon arrival at the subterminal the helper proceeded to unload the truck by removing packages and parcels from the body thereof and placed them on the tail board of the truck from where they were removed by the respondents and placed

within the sub-terminal building, after which the respondents delivered the packages to the various consignees located in and about the Garment Center, by and through the means of hand trucks which were manually pushed through the streets. In some instances the said trucks, instead of proceeding directly to the sub-terminal, were driven to locations within the Garment Center where they were parked alongside the street curbs where the same loading operations above described were performed, except that the respondents delivered the said packages and parcels directly to the consignees thereof instead of temporarily placing them within the petitioner's sub-terminal (R. 35-36).

4. In the late afternoons or early evenings, packages and parcels consigned from the Garment Center and intended for delivery outside of the State of New York, were picked up by the respondent's at the consignor's places of business, and hand-trucked by them to the 38th Street Terminal where they were loaded into the waiting trucks, and except in some instances where the weight or size of the packages required the respondents to assist the truck helper in placing them within the body of the trucks, their participation in loading operations was limited solely to lifting the packages to the tail board of the trucks, from where they were removed and stacked in the truck by the said helper (R. 36-37).

5. All of the respondents, with the exception of Shapiro, generally walked between the various points where the trucks stopped to discharge packages, but Shapiro, as a matter of fixed duty, rode on the truck with the driver and his helper about four (4) or five (5) hours each day during the period from August, 1939 to September,

1941. The remainder of his work day (about three and a half (3½) hours) was devoted to inside office work at the sub-terminal (R. 57).

6. The petitioner was engaged in commerce, and the respondents were engaged in commerce and in the production of goods for commerce within the meaning of the Act, and that respondents were not compensated for the overtime services which they rendered to petitioner (R. 34).

The order likewise fixed the sums of money due the respondents as unpaid overtime compensation in the event that the Trial Court found that they were covered by the Act, (R. 38, 40-44), and framed the issues as follows:

1. Plaintiffs (Respondents) contend that they are covered by the Fair Labor Standards Act of 1938 and particularly by Section 7 (a) thereof (R. 38). Defendant (Petitioner) contends that plaintiffs (Respondents) are not covered by the Act and are specifically exempt from the provisions of Section 7 (a) by Section 13 (b) (1) thereof (R. 38).

In lieu of a trial the order was submitted to the Trial Judge who, under date of November 29, 1943, rendered an opinion (R. 45-55) which was substantially to the effect, that inasmuch as the petitioner was a common carrier of goods in interstate commerce and thus under the jurisdiction of the Interstate Commerce Commission, the respondents, as a condition precedent to recovery were duty bound to show that they did not belong to a class of employees over whom the Commission had the power to regulate maximum hours and working conditions, and in the absence of such a showing, the Court should not undertake to determine from the agreed statement of facts whether or not the respon-

dents were under the jurisdiction of the Commission and thus exempt from the provisions of the Act by reason of Section 13 (b) (1) thereof. The opinion made no disposition whatever of the action but allowed it to remain in *status quo* in order to allow the respondents an opportunity to apply to the Commission for a ruling fixing their status as employees. Presumably the Court was of the opinion that with such ruling it could then proceed to a final determination of the cause before it.

The respondents declined to adopt the procedure suggested by the opinion and thereupon moved the District Court for a final disposition of the action, either by way of a judgment in their favor or for an order dismissing the complaint (R. 56-62).

As the result of such motion, the Trial Judge, under date of January 12, 1945, rendered a second opinion (R. 63-68) substantially in conformity with the first opinion, and thereafter and under date of February 14, 1945 signed an order dismissing the complaint. An appeal from such order was then taken to the Circuit Court and the notice of appeal to that effect was filed on April 2, 1945.

Due to an inadvertance on the part of the attorneys for the respondents, the Record on Appeal was not filed within ninety days following the date on which the Notice of Appeal was filed. However, upon due notice to the attorney for the petitioner, an order was applied for and obtained from the Circuit Court extending the respondents' time within which to file the Record, to and including September 1, 1945 (R. 73). The order extending the time was duly complied with, and the Record on Appeal was filed in accordance therewith.

Prior to the argument of the Appeal, the attorney for the petitioner moved the Circuit Court for an order dismissing the appeal on the ground that the Record was not filed within the time prescribed by Statute, and the Circuit Court had

no power to extend the filing date (R. 74-83). This motion was duly considered by the Circuit Court and properly denied (R. 83). On the argument of the appeal itself the petitioner again renewed its motion to dismiss on the grounds above stated and the motion was again denied (R. 85), by the unanimous opinion of the Circuit Court (R. 84-88) which affirmed the judgment of the District Court as to Shapiro, but reversed such judgment as to the other respondents. Other particulars of the proceedings not specifically mentioned herein are contained and set forth in the statement under Rule 13 of the Rules of the Circuit Court (R. 1-3).

Opinions Below.

The opinions of the United States District Court for the Southern District of New York are reported at 54 Fed. Supp. 565, and 59 Fed. Supp. 341.

The Opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported.

Jurisdiction.

The judgment of the District Court was filed on February 19, 1945.

The judgment of the Circuit Court was filed on December 28, 1945.

The petition for a Writ of Certiorari to the Circuit Court of Appeals was filed on February 7, 1946.

The petition, brief, record and notice of filing petition was served upon counsel for the respondents on February 19, 1946.

The petitioner invokes the jurisdiction of this Court under the Act of February 13, 1925 (c. 229; 43 Stat. 938 amending the Judicial Code Sec. 244) (28 U. S. C. A. 347a) and Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Which Petitioner Claims Are Presented by this Application.

The manner in which the petitioner has set forth what it considers to be the questions presented by this petition is somewhat confusing, therefore the respondents undertake here to re-state what appears to them to be the questions which the petitioner intended to propound. These questions simply stated, are as follows:

1. (a) Does the Commission have authority to determine the class of motor carrier employees over whom it has the power to prescribe qualifications and maximum hours of service?

(b) Does it constitute an invasion of the Commission's administrative authority for a Court to make such a determination?

2. If the Commission determines that the activities of certain motor carrier employees affect the safety of operation of motor vehicles, does a judgment by the Circuit Court of Appeals in favor of such employees in an action commenced under the Act constitute a judicial review of the Commission's determination in regard to such activities?

3. (a) Inasmuch as the Commission has undertaken to exercise jurisdiction over a class of motor carrier employees known as "loaders" whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse, is it error for the Circuit Court, in an action commenced under the Act, to decide that only so much of the time spent by such employees in stacking and

piling freight in outgoing vehicles is devoted to activities which affect the safety of operation of such vehicles; and

(b) Was it error for the Circuit Court to render judgment in this action in favor of the respondents when the petitioner failed to prove the amount of time which the respondents devoted to activities which affected the safety of operation of motor vehicles?

4. Was the Circuit Court correct in deciding that the Commission intended to assert jurisdiction over that class of motor carrier employees known as "loaders" only in the event that a substantial part of their time is spent in stacking and piling freight in outgoing vehicles?

5. Did the Circuit Court abuse its descretion in enlarging the respondents' time within which to file and docket the record on appeal from the District Court?

While the foregoing would seem to summarize what the petitioner claims should be reviewed by this Court, the record itself discloses that such questions are wholly academic insofar as this proceeding is concerned and have no bearing whatever upon the judgment of the Circuit Court which was predicated entirely upon a basic rule of law involving the petitioner's failure to meet the burden of proof imposed upon it by the affirmative defenses interposed to the complaint. The respondents deny that the questions propounded by the petitioner arose from the decision of the Circuit Court, or that they are pertinent to the instant application for a Writ of Certiorari.

SUMMARY OF ARGUMENT

POINT I.

The decision of the Circuit Court did not invade the administrative authority of the Commission and no important questions of Federal law arose therefrom which require review by this Court.

POINT II.

The granting of the order extending the respondents' time within which to file and docket the record on appeal did not constitute an abuse of judicial discretion.

DISCUSSION

I.

The decision of the Circuit Court did not invade the administrative authority of the Commission and no important questions of Federal law arose therefrom which require review by this Court.

Under Point I. of its brief, the petitioner asserts that by reason of this Court holding in *U. S. vs. American Trucking Associations, Inc.*, 310 U. S. 534, that the jurisdiction of the Commission is confined to those employees whose activities affect the safety of operation, the Administrator of the Wage and Hour Division of the Department of Labor has been given an added incentive to agitate for an expansion of the Act to the limit of its application in the motor carrier industry; and that in order to accomplish his purpose in that respect, he has introduced and fostered wholly impractical ideas and extremist points of view which encroached upon the Commission's administrative field. The

petitioner also contends that a number of the orders and rulings which have emanated from the Administrator in his zealousness to extend the application of the Act have given rise to many questions of Nationwide importance which prompted this Court to grant certiorari in *Levinson vs. Spector Motor Service*, (139 Oct. Term, 1945) and *Comet Carriers, Inc. vs. Walling*, (609 Oct. Term 1945). It is likewise contended that such questions are more sharply presented by this case than by those in which certiorari was granted; the inference being that the *Levinson* and *Comet* cases should be relegated to a secondary position and this Court here undertake to decide from the facts presented a controversy which is alleged to exist between the Administrator and the Commission and which threatens the future welfare of the entire motor industry.

The fact that there may or may not exist a conflict of opinions between the Administrator and the Commission regarding the extent of their respective powers is of no significance insofar as it pertains to this application, and the difficulty with the petitioner's position at the very outset is to be found in the fact that it either has, and still is laboring under a misapprehension regarding the nature of the only question which was passed upon by the Circuit Court of Appeals, or else it has and is attempting to confuse the issue and divert attention to matters other than those which are directly involved herein.

There is nothing in this record which even remotely involves any controversy or conflict of authority between the Courts, the Administrator and the Commission; neither does this application present a situation where the Circuit Court has attempted to limit, enlarge or in any manner pass upon the administrative functions of either of these agencies. On the contrary, the only question presented to and passed upon by the Circuit Court was one which involved a basic rule of law, fixing the burden of proof and

designating the party upon which it should rest. It is therefore inconceivable that the Circuit Court's decision could have possibly given rise to any question comparable to those which permitted this Court to consent to review the *Comet* and *Levinson* cases. It might very well be that some speculation did arise from the decision in the *Comet* case, especially where the employee who admittedly belonged to a class over whom the Commission exercised jurisdiction and who drove and operated a motor truck in both intrastate and interstate commerce, was held nevertheless not to be subject to the jurisdiction of the Commission because a substantial part of his time was not devoted to operational activities in interstate commerce.

By the same token, an equal opportunity for speculation may have arisen from the *Levinson* case. There the question was raised as to whether or not the Commission's ruling fixing the extent of its jurisdiction (28 M. C. C. 131) was to be construed as applying to a substantial part of time devoted to activities affecting safety of operation or whether the activities substantially affected the safety of operation. This Court may have considered the question of major importance due to the fact that the employee, although the foreman of a gang whose entire time was devoted to activities which affected safety of operation, did not himself devote a substantial part of his time to such activities. On the surface it is evident that these cases may have given rise to matters which should be passed upon by this Court, but they are far removed and entirely unrelated to the case at bar, either in form or in substance and there is no common design or mutuality of interest between them. In both the *Levinson* and *Comet* cases the facts were established by a full disclosure of the evidence whereupon the Courts proceeded to interpret the law in the light of the established facts. Whether such interpretations are in accord with the views of this Court are matters which still remain to be

seen, but this petition does not present a similar or comparable situation.

Here the Circuit Court was faced with a very simple problem; it had before it an agreed statement of facts which showed conclusively that the respondents' duties were divided into two categories, neither of which, in the absence of further proof, could be said to have affected safety of operation. In the mornings the respondents would meet in-bound trucks and as packages were unloaded by the driver's helper, the respondents would take such packages from the tailboard of the trucks and temporarily place them in the petitioner's sub-terminal from which they were later removed and hand-trucked through the streets by the respondents and delivered to the consignees whose names and addresses appeared thereon. In the late afternoons and early evenings this procedure was reversed and it then became the duty of the respondents to call upon various manufacturers in the Garment District and pick up packages intended for delivery outside of the State of New York, and hand-truck them to the petitioner's trucks which were sometimes parked at its sub-terminal and on other occasions on the public streets alongside the curbs. In some instances when the parcels were unusually large or heavy, the respondents assisted the driver's helper in placing them in the body of the truck. All of the respondents, with the exception of Shapiro, generally walked between stopping points, but occasionally they rode on the trucks between such points in order to avoid the loss of time entailed by walking. On the other hand, Shapiro, as a matter of fixed duty and in addition to the driver and the driver's helper, rode on the trucks for a period of four or five hours each day, but the remainder of his time was devoted to inside office work (R. 36-37).

On the basis of the facts thus presented, together with the petitioner's concession that the respondents were engaged

in the production of goods for commerce within the meaning of the Act, during the course of which they had rendered overtime services to the petitioner for which they were not compensated (R. 34), it became apparent that they were entitled to the full benefits of the Act, unless the evidence clearly disclosed that they came within the exemption provisions thereof. *Kirschbaum Co. vs. Walling*, 316 U. S. 517; 62 Sup. Ct. 1116; *Warren-Bradshaw Drilling Co. vs. Hall*, 317 U. S. 88. Such being the case, the Circuit Court had to examine the record in order to determine that it was absolutely bare of any statement or facts from which it could be concluded that the respondents were not entitled to the benefits of the Act, and in the absence of any proof whatever in support of the petitioner's defense, the Circuit Court had no alternative except to decide that the petitioner had not carried the burden of proof with which it was imposed.

In support of the suggestion that the petitioner is either attempting to confuse or has itself become confused with respect to the significance of the Circuit Court's decision, attention is called to that part of its brief at page 21, wherein it is stated:

> "That court, first without any reference to what the Commission may have decided, approached the case as if there were presented to it a judicial question (rather than administrative) as to whether or not it was shown of record that the work of the suing employees affected safety of motor carrier operations. That court, of its own volition, and not on any sort of record fully developing facts that would be pertinent in an administrative proceeding, resolved that safety of operations is affected only by so much of the work of those engaged solely as loaders or helpers as may involve respectively their riding the trucks or their standing inside outgoing truck vehicles piling and stowing the freight."

Obviously this case presented a legal question rather than an administrative one, and the Court neither invaded the Commission's jurisdiction nor collaterally attacked any of its rulings or determinations in deciding that the petitioner had not carried its burden of proof. The mere fact that the petitioner throughout its brief, refers to the respondents as "loaders" and asserts that the stipulated "facts were agreed, the employees were solely engaged in work as 'loaders' " (Petitioner's Brief 8), neither makes them loaders nor does it lend truth or color to the statement that they were engaged and worked as loaders. On the contrary, the respondents were employed and rendered services solely as "push-cart and delivery boys", a class of motor carrier employees over whom the Commission has not seen fit to extend its jurisdiction. Their trade names adequately describe their work: namely, pushing hand-trucks through the City streets delivering packages and parcels, and their activities in this respect could not possibly have affected safety of operation. The Circuit Court being mindful of the fact that in some few instances where the respondents, as an accommodation to a driver's helper, assisted him in placing heavy packages in the truck, considered these activities in the light of the Commission's ruling that it "has power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation" (28 M. C. C. 131), and thereupon rightfully concluded that upon the record the petitioner had not carried the burden of showing that "loading" occupied a substantial part of the respondents' working time. There was no other conclusion for the Court to reach in view of the utter lack of evidence to support the petitioner's claim of exemption. While the petitioner's inability to support its defense may be disconcerting it is none the less the answer to this application and "perplexing as petitioner's

problem may have been, the difficulty does not warrant shifting the burden to the employee". *Overnight Motor Transp. Co. Inc. vs. Missel,* 316 U. S. 572, 583. See also *Helliwell et al. vs. Haberman,* 140 Fed. 2d 833; *Smith vs. Porter,* 143 Fed. 2d 292; *Stratton vs. Farmers Produce Co.,* 134 Fed. 2d 825; *Helena Glendale Co. vs. Walling,* 132 Fed. 2d 616.

If the Circuit Court erred in any respect it was in connection with the respondent Shapiro. Despite the fact that he rode on the petitioner's trucks for the greater part of each working day, the fact remains that the record is bare of any evidence which would indicate the nature of the services which he rendered. No doubt the Court concluded that because he rode on the truck he was a driver's helper and thus under the Commission's jurisdiction, but at best, this is only an inference which does not seem to flow from any of the facts established. The mere act of riding upon a truck would not within itself appear to be an activity which could affect safety of operation and it is just as consistent to assume that his duties were devoted to checking or recording packages as it is to assume that he loaded or assisted in loading them, particularly in view of the fact that each truck was manned by a driver and a helper whose duty it was to load and unload. The petitioner failed to carry the burden of proof even insofar as Shapiro was concerned, and grave doubt exists as to whether the Circuit Court was justified in assuming, in the absence of positive proof, that he was subject to the jurisdiction of the Commission and thus exempt from the provisions of the Act. Although the respondents feel that no reason whatever exists for granting certiorari herein, it is urged that in the event this Court should decide to the contrary, the judgment of the Circuit Court, insofar as it pertains to Shapiro, should likewise be reviewed.

II.

The granting of the order extending the respondents' time within which to file and docket the record on appeal did not constitute an abuse of judicial discretion.

It is not deemed necessary to comment at any great length upon the petitioner's contention that the Circuit Court abused its discretion in extending the respondents' time within which to file and docket the record on appeal. Suffice it to say that the order extending such time was made and entered pursuant to the provisions of Rules 6 (b) (2) and 73 (a) of the Federal Rules of Civil Procedure, which vest in Circuit Courts of Appeal power to enlarge the time for filing even after the expiration of the period (90 days) provided by law. *Ainsworth vs. Gill Glass & Fixture Co.*, 104 Fed. 2d 83; *Mutual Benefit Health & Accident Assn. vs. Snyder*, 109 Fed. 2d 469.

There is no conflict of opinion in regard to the construction of these rules for the reason that this very question has been passed upon by different Circuit Courts on different occasions, and their decisions have always been wholly consistent. On two separate occasions the petitioner's motion to dismiss the appeal was heard at great length and each time the circumstances concerning the delay in filing were fully inquired into. The petitioner's claims were carefully considered and rejected and there was no abuse of judicial discretion in granting the order complained of.

CONCLUSION.

The Petition should be dismissed and the Writ of Certiorari denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 41.

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

—v.—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS

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Under Rule 73(a) of the Federal Rules of Civil Procedure the Circuit Courts of Appeal are vested with the power to extend and enlarge the time within which to file a Record on Appeal, even though the ninety day period prescribed by Rule 73(g) has expired, and the Circuit Court of Appeals for the Second Circuit did not in this instance abuse its discretion in extending the respondents' time within which to file and docket the Record on Appeal. 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 41.

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

Statement.

This appeal comes to this Court upon its order dated March 25, 1946 granting an application by the Petitioner for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court which partially reversed a final order and judg-

ment[1] of the United States District Court for the Southern District of New York, which dismissed the complaint in an action instituted by the Respondents against the Petitioner, to recover unpaid overtime wages under and pursuant to the provisions of the Fair Labor Standards act of 1938, c.676, 52 Stat. 1062, 29 U. S. C. A., Sec. 201 et seq. (hereinafter referred to as the Act).

The action was originally commenced in the City Court of the City of New York, but on the application of the Petitioner it was removed to the United States District Court which heard and finally decided the case solely upon an agreed statement of facts[2] (rec. 24-31).

The order dismissing the complaint (rec. 50-51) was filed on February 19, 1945 after which, the Respondents, on March 29, 1945, filed their Notice of Appeal to the Circuit

1. Prior to the entry of the order dismissing the complaint the District Court wrote an opinion (54 Fed. Sup. 565) which made no final disposition whatever of the action but merely suggested that the Respondents apply to the Interstate Commerce Commission for a ruling as to whether or not they belonged to a class of employees over whom the Commission exercised jurisdiction (rec. 34-39). Upon motion by Respondents for a final determination of the action (rec. 39-44) the District Court rendered an opinion (59 Fed. Supp. 341) upon which the order dismissing the complaint was entered.

2. The stipulated facts were substantially as follows: The petitioner was engaged in business as a common carrier of property for hire by motor vehicle in interstate commerce. It operated motor trucks between Wilmington, Delaware, Philadelphia, Pennsylvania and New York City, in which latter City it maintained a main terminal on West 11th Street and a sub-terminal on West 38th Street in the Garment District to and from which freight consigned and originating in that district was shipped and delivered. The Respondents were employed by Petitioner as push-cart boys, whose duties consisted of picking up in-bound freight at the Petitioner's sub-terminal (sometimes from the tail boards of the trucks) and delivering it by hand or hand-truck to the consignees or the recipients thereof located in the Garment District. In the late afternoons or early evenings freight consigned from the Garment District and intended for delivery outside of the State of New York was picked up by Respondents at the consignees' places of business and hand-trucked by them to the Petitioner's sub-terminal where other persons (drivers' helpers) loaded it into waiting trucks. Except in some instances where the weight or size of the packages required the Respondents to assist the drivers' helpers in placing them within the body of the trucks, the Respondents participation in loading operations was limited solely to lifting the packages to the tail board of the trucks from where they were removed and stacked into the body of the trucks by other persons.

Court of Appeals. Due to an unavoidable delay which counsel (on appeal) for the Respondents experienced in obtaining from the attorneys of Record the Record on Appeal, as well as to a misunderstanding which arose between them in regard thereto, the said Record was not filed and docketed in the Circuit Court within the time prescribed by Rule 73 g. of the Federal Rules of Civil Procedure. Thereafter and under date of July 20, 1945, the Circuit Court, upon application by Respondents, due and timely notice of which was given to Petitioner,[3] made and entered an order (rec. 53) enlarging and extending to September 1, 1945, the Respondents' time within which to file the said record.

The Petitioner did not oppose the application to enlarge the time, but waited until after the Record was filed and then moved the Circuit Court for an order dismissing the appeal on the ground that the Respondents had not complied with Rule 73 g. (rec. 54-62). After due deliberation, the Court denied the Petitioner's motion (rec. 63) which was again renewed by the Petitioner upon the argument of the appeal and again denied by the Circuit Court (rec. 65) which, by its order dated December 28, 1945, reversed the District Court and granted judgment in favor of all of the Respondents except Shapiro, with respect to whom the judgment of the District Court was affirmed.[4] (rec. 68-69).

Questions Presented.

Upon this record it would appear that there are only two questions presented by this appeal; namely, (1) were the respondents exempt from the benefits of the Act by reason of the fact that the Interstate Commerce Commission,

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3. The receipt of notice of the application for the extension of time within which to file the record was admitted by Petitioner at page 31 of its brief submitted in support of its petition to the Supreme Court for a writ of certiorari.

4. The opinion of the Circuit Court is reported at 152 Fed. 2d 619.

(hereinafter referred to as the Commission,) was vested with the power to regulate their qualifications and maximum hours of service?; and (2) did the petitioner, under its defense of exemption, sustain the burden of proof that the Respondents were in fact exempt from the benefits of the Act?.

Although it seems that these are the only issues which warrant any consideration whatever, the Petitioner also seeks to have this Court review the Circuit Court's action in denying, on two separate occasions, the motion to dismiss the appeal on the grounds stated. Such being the case, the first part of this brief is directed to a discussion of that point.

POINT I.

Under Rule 73(a) of the Federal Rules of Civil Procedure the Circuit Courts of Appeal are vested with the power to extend and enlarge the time within which to file a Record on Appeal, even though the ninety day period prescribed by Rule 73(g) has expired, and the Circuit Court of Appeals for the Second Circuit did not in this instance abuse its discretion in extending the respondents' time within which to file and docket the Record on Appeal.

It is extremely difficult, if not impossible, to reconcile the divergent views which the Petitioner has advanced as to the reason why the Circuit Court erred in denying the motion to dismiss the appeal. On the one hand the Petitioner states that the Circuit Court was without power to extend the respondents' time, and on the other, asserts that the Court abused its discretion in so doing. Obviously the two statements are diametrical for the simple reason that an accusation of an abuse of discretion must, by necessity,

admit to the power of the Court to function in the first instance whereas the lack of power to act in a given situation would not afford an opportunity for the Court to abuse its discretion.

In urging that the Circuit Court lacked power to grant the extension, the Petitioner evidently has become confused with respect to the meaning and interpretation which the Courts have given to Rule 73(a)[5] and 73(g)[6].

The power of the District Courts to grant extensions is governed wholly by Rule 73(g) which applies to the District Courts and to the District Courts alone, whereas the power of the Circuit Courts is derived from Rule 73(a) which unambiguously provides that the validity of an appeal is not affected by the failure to perfect it. Where the appeal has not been perfected within the time prescribed by Rule 73(g), the Circuit Court, under Rule 73(a), is vested with the power to do that which it "deems appropriate, which may include dismissal of the appeal." Thus, the wording of the Rule itself, particularly the last six words of the last sentence, clearly indicates that the Supreme

5. 73(a) HOW TAKEN. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

6. 73(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Court, in promulgating the said Rules, intended that the Circuit Courts be vested with power to exercise their discretion in the matter of granting extensions and were not obliged to dismiss the appeal because it had not been perfected within the prescribed time. If the contrary were true, there would be no reason or explanation whatever for the language used, and this Court is not disposed or inclined to the use of words which are meaningless.

The precise question has been presented to other Circuit Courts on former occasions, and in each instance they have consistently applied a liberal construction and interpretation to Rule 73(a). In *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83, the Third Circuit, in denying a motion to dismiss an appeal for failure to file and docket the record within the prescribed time, said that it was clear that under the provisions of Rule 73(a) the failure of the appellant to file the Record in time did not invalidate the appeal but merely furnished the basis for such action as the Court deemed appropriate, which included the authority to permit the appeal to be filed either before or after the expiration of the ninety day period prescribed by Rule 73(g). Also in *Burke* v. *Caufield*, 111 F. 2d 526, in which the Chief Justice and Mr. Justice Rutledge of this Court participated, the Circuit Court of Appeals for the District of Columbia, by a unanimous opinion, held that although an order of the District Court extending the time within which to file the Record was invalid and of no force or effect by reason of the fact that it was made forty-five days after the Notice of Appeal was filed, the appellant's failure to file and docket the appeal within the time allotted by Rule 73(g) was not fatal because under Rule 73(a), the Circuit Court could exercise its discretion and allow the appeal to be filed even though the time within which to do so had expired.

The same conclusion was reached by the Sixth Circuit in *Mutual Benefit Health & Accident Assn.* v. *Snyder*, 109 F. 2d 469, and also by the *Ninth Circuit in U. S.* v. *Gallagher*, 151 F. 2d 556, where the Court, although expressing in no uncertain terms its power to enlarge the time, nevertheless dismissed the appeal because the Appellant offered no excuse whatever for its failure to file the Record or serve upon the Appellee a designation thereof as prescribed by Rule 75(d). The Petitioner refers to the cases above cited (p. 5 of Pet. brief) but contrary to the position which it took in its former brief submitted in support of the petition for certiorari, now claims that the action taken by the Courts in those cases is not in harmony with that taken by the Circuit Court in this instance. Here again we have inconsistency and indecision on the part of the Petitioner, and it is difficult to understand what interpretation, if any, it places upon the Rules mentioned. The language of Rule 73(a), as well as the judicial interpretation thereof, make it clear that the Circuit Courts have the power and authority to permit an appeal to be filed after the expiration of the ninety day period prescribed by Rule 73(g), but the Petitioner either disagrees with this view or is confused with respect to the authority vested in the District and Circuit Courts by the two rules. In either event the situation is unaltered insofar as the Circuit Court's power is concerned and the exercise of that power in this case did not constitute an abuse of judicial discretion. The Circuit Court had before it in affidavit form, all of the reasons why the appeal had not been perfected, and even though it later referred to the excuses as feeble, the court nevertheless considered them of sufficient merit to grant the application which it deemed quite appropriate under the circumstances. Aside from the fact that there is nothing to show that there was an abuse of discretion on the part of the Circuit Court,

there is absolutely nothing to show that the Petitioner was harmed by the granting of the extension and it does not even claim that it was harmed except in what the Petitioner terms its "right to repose", which not only is meaningless, but an obvious figment of the imagination.

POINT II.

The Petitioner's defense of the action on the ground that the Respondents were exempt from the benefits of the Act by reason of the fact that they belonged to a class of employees over whom the Commission had the power to exercise jurisdiction, imposed upon the Petitioner the burden of proving the exemption claimed, and the Petitioner failed to meet and carry such burden of proof in the Trial Court.

In view of the fact that the judgment of the Circuit Court was based primarily, if not wholly, upon the failure on the part of the Petitioner to meet the burden of proof imposed upon it by its affirmative defense of exemption, it seems that such determination, if in accord with the intent of the Statute and the weight of authority, would require affirmance by this Court and thus dispose of this appeal without the necessity of giving further consideration to any other questions which may be involved. With that in mind it is deemed expedient to discuss in the first instance, the question which was primarily considered by the Circuit Court and upon which its decision was based.

In the agreed statement of facts (rec. 24-31) the Petitioner admitted that the Respondents were engaged in the production of goods for interstate commerce within the meaning of the Act, and performed duties *the nature of which*, left no room for doubt that they were delivery boys pure and simple. In the mornings they received packages

from the tail board of incoming trucks and placed them in the Petitioner's sub-terminal, after which the Respondents hand-trucked the packages through the streets of the Garment District to the premises of the addressees and consignees. In the afternoons and evenings the Respondents picked up packages from the premises of various manufacturing concerns located in the Garment District and hand-trucked them to the sub-terminal or to the out-going trucks where the packages were loaded by persons (*drivers' helpers or loaders*) other than the Respondents. Except on some occasions where the weight and size of the packages required the Respondents to assist the loaders in stacking the packages within the body of the trucks, the Respondents participated in the loading operations only to the extent of *lifting the packages to the tail board of the trucks.* The Petitioner also admitted that the Respondents were entitled to recover overtime wages pursuant to the provisions of the Act unless they were exempt from its benefits by Section 13 (b) (1) thereof.

Except for the agreed statement of facts, there was no evidence of any kind before the Trial Court with respect to the nature of the Respondents' duties, neither was there any admission, concession or other statement regarding the Petitioner's affirmative defense other than a statement *that Petitioner claimed the exemption.*

Although the Petitioner's claim of exemption was wholly unsupported by the evidence or otherwise, the Trial Court, from the very outset, evinced a firm determination to deal with the controversy not on the basis of the facts presented and in the light of provisions of the Act and the numerous authorities construing it, but on a theory entirely of its own conception and uniquely without precedent. Proof of the fact that the Trial Court not only intended to but actually did completely disregard the rules of evidence insofar

as they pertain to the Petitioner's burden of proof, is found in that part of its second opinion,[7] wherein it stated:

> "This cause should, therefore, not be determined on the basis of the affirmative in the pleadings, nor the incidence of the burden of proof. Nor should a determination be based upon the question of whether a technical exemption is created by the statute as a result of which the proof of the fact that a plaintiff performs work which promotes the safety of the operation of the motor vehicles falls upon defendant" (rec. 48).

Aside from adopting what, to say the least, is a revolutionary view, the Trial Court further expanded its theory so as to impose upon the Respondents obligations which certainly were never intended by the Statute. In this respect the Court said:

> "No showing has been made to the court that plaintiffs were not employees for whom the Commission may have jurisdiction to prescribe maximum hours of service. There is no showing that the Commission has excluded plaintiffs, or the classes of employees to which each respectively belongs, from the circle of jurisdiction" (rec. 45).

In other words, the Court not only presupposed that the Respondents belonged to a particular class of employees, but said as well that they should have established that they were not under the jurisdiction of the Commission and did not come within the exemption provisions of the Act. To say that the views thus expressed by the Trial Court are revolutionary or unique is to put it mildly, because they

7. 59 Fed. Sup. 341.

represent a complete departure from what has always seemed to be a well established principle of law.

In adopting the Act, it was the intention of Congress to include within its protective features every employer and employee engaged in commerce and in the production of goods for interstate commerce. *Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88; *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616; *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie v. Gonzalez*, 117 F. 2d 111; and since the Statute is remedial and by its terms includes every employer and employee coming within the broad scope of its coverage, the section granting exemptions is to be strictly construed against those claiming the exemptions. Plainly the defense of exemption in this case gave rise to a question of fact, and the burden of proving that fact was imposed wholly upon the Petitioner. *Helliwell et al. v. Haberman etc.*, 140 F. 2d 833; *Consolidated Timber v. Wormack*, 132 F. 2d 161; *Schmidtke v. Conesa*, 141 F. 2d 634; *Walling v. Sun Pub. Co.*, 140 F. 2d 445; *Farelli v. Gypsum*, 141 F. 2d 216; *Fletcher v. Grinell Bros.*, 150 F. 2d 337; *George Lawley & Son Corp. v. Smith*, 140 F. 2d 439.

Despite the abundance of authority on the subject, the Petitioner without reference to a single citation states (Pet. brief, p. 20) that: "the general rule regarding the burden of proof is that the required information must come from the person best able to furnish it." By this statement the Petitioner in effect says that inasmuch as it kept no records of the Respondents' employment and was not in a position to know the facts of its own defense, it was the duty and responsibility of the Respondents to disprove Petitioner's claim of exemption. In other words, the Petitioner says that by reason of the difficulty which it encountered it was not obliged to prove its defense. The opinion of this Court

in that regard was clearly expressed in *Anderson* v. *Mt. Clemens Pottery Co.*, 66 Sup. Ct. 1187, where attention was called to the fact that under Section 11(c) of the Act, it was the duty of the employer to keep proper records of wages, hours and other working conditions and practices, because it is the employer and not the employee who is in the "position to know and to produce the most probative facts concerning the nature and amount of the work performed". The view so expressed in the *Anderson* case would seem to settle the question as to who has the burden of proof and nullify the Petitioner's claim that the Circuit Court, in this case, usurped the administrative function of the Commission by concluding that the duties performed by the Respondents did not affect the safety of operation of the Petitioner's motor trucks. Although the Circuit Court could have passed upon that question[8] the opinion will indicate that it did not do so; it simply said that the Petitioner had failed to meet its burden of proof, and there was no determination one way or the other as to whether the whole or any part of the respondents' duties substantially affected safety of operation or whether a substantial part of their time was devoted to such duties.[9] The Court merely took the position that the Petitioner had offered no proof one way or the other, and it could not look to the Commission

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8. The Statutes involved do not indicate that Congress committed to the Commission solely the administrative duty of determining what kind of work affects safety of operation. *Shields* v. *Utah-Idaho R. R.*, 305 U. S. 177; *Gray* v. *Powell*, 314 U. S. 402. On the contrary, the Act which contains the exemption provision provides that actions may be brought in any Court of competent jurisdiction, and this is indicative of the fact that Congress intended in the first instance to vest in the Courts the power to determine what work falls within the exemption.

9. Inso ar as Shapiro is concerned, it is believed that the Court rightfully concluded from the facts before it, that inasmuch as he rode a truck every day, he belonged to the class of employees known as drivers' helpers over whom the Commission itself exercised jurisdiction and of which fact the Court may have taken judicial notice.

for any guidance on the subject for the reason that the Commission, even if it has the power (which is dubious), had not then, and has not yet seen fit to extend its jurisdiction to the class of employees to which the Respondents may belong. In reaching its decision, the Circuit Court was guided only by the Petitioner's lack of proof, which failure it sought to overcome by shifting the burden to the Respondents, but "perplexing as the Petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 583; 62 Sup. Ct. 1216, 1222.

POINT III.

The Interstate Commerce Commission does not have power to establish qualifications and maximum hours of service for the respondents.

While we believe that the Petitioner's failure to meet its burden of proof is decisive in this case, we are equally convinced that the Respondents did not perform any duties whatever which substantially affected the safety of operation so as to subject them to the jurisdiction of the Commission. Should this Court, however, disagree with our reasoning in this respect, we express with equal vigor our further belief that it was not the intent of Congress to subject to the jurisdiction of the Commission so as to deprive them of the benefits of the Act, those motor carrier employees who spend an unsubstantial part of their time performing duties which do not affect the safety of operation. Bearing in mind that the power of the Commission over motor employees is limited solely to those whose duties affect safety of operation, *U. S. v. American Trucking Assn. Inc.*, 310 U. S. 534, Ex parte No. MC-2 (28 M. C. C. 139),

it would appear from an examination of the stipulated facts that the Respondents do not come under the Commission's jurisdiction. Admittedly, the major part of each work day (*from mornings to late afternoons or early evenings*) was devoted to removing packages from the tail board of the trucks[10] and placing them in the Petitioner's sub-terminal from which they were later removed and delivered by hand or hand-truck. The Petitioner itself concedes that those activities did not affect safety of operation (Pet. brief p. 16), and the Commission [its brief (p. 19) submitted *amicus curiae* in *Levison v. Spector Motor Service*, previously before this Court (No. 139, October Term 1945)], makes the identical concession. Therefore, the only time left during which the Respondents could have performed any service whatever which may have affected the safety of operation was during the hours commencing in the "late afternoon or early evenings" and terminating at the end of the work day.

Of that time (from late afternoons or early evenings to the end of the work day), the greater part was taken up in collecting and picking up from the premises of various manufacturing concerns packages intended for shipment outside of the State of New York and delivering them through the streets of the City by hand-trucks to the Petitioner's waiting trucks. The duties thus performed in collecting packages and delivering them alongside the trucks surely did not affect safety of operation, so that the only time left to be considered is the time spent in lifting the packages from the sidewalk to the tail board of the trucks, and that spent on those occasions when the Respondents, due to the weight or size of the parcel, assisted the loader in stacking it in the body of the truck. In the absence of any enlighten-

10. The driver's helper unloaded the packages from the body of the truck and placed them on the tail board.

ment whatever on the subject, it would appear by simple reasoning that the act of lifting packages from the sidewalk to the tail board of the trucks would no more affect safety of operation than the act of piling the packages on the sidewalk, because safety of operation is not involved until the truck is actually loaded and in operation; however, the Commission, in its report (*Ex parte No. MC-2, 28 MCC 139*), has defined the term "safety of operation" as meaning "the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone."

Thus, from the Commissioner's own definition of the term, it would appear that only those activities which directly affect the safety operation of a motor vehicle while it is in operation, such as preparing the vehicle for operation (*mechanical, repairs, adjustments etc.*), loading it with freight (*actually placing freight in the body of the truck in the position in which it is intended to remain during the trip*) and actually operating or assisting in its operation on the highway, would come under the jurisdiction of the Commission. If that be true, it then follows that the physical act of lifting the packages from the sidewalk to the tail board of the truck would not in any manner affect its operation, because such acts did not constitute loading. Purely as an after-thought upon this appeal, the Petitioner refers to the Respondents as loaders, but such reference and designation does not make them loaders. They were not referred to or designated in the agreed statement of facts as loaders and the detailed description of their duties as set forth therein precludes any presumption from arising that they were in fact loaders or performed any duties similar or akin to those performed by loaders.

In those instances where, due to the weight or size of the packages, the Respondents assisted the loaders in stacking

them within the body of the truck, it is fair to presume and it seems to find support in the facts, that their activities in that respect were more or less gratuitous and just as much beyond the scope of their regular employment as it would have been beyond that of a rate clerk who may have sporadically rendered similar assistance.

In any event, it is obvious that whatever assistance the Respondents may have given to the loaders on some few occasions did not substantially affect the safety of operation which the Commission, contrary to its former ruling (*ex parte MC-2*) now urges (*Levison* Case #22, October Term, 1946), is the determining factor rather than the devotion of a substantial part of the working time to such activities. Issue is here taken with the turn-about view which the Commission now expresses, but assume, arguendo, that the assistance which the Respondents gave to the loaders on some remote occasions did substantially affect safety of operation, it would further appear most unlikely that the Commission, even in that case, possessed regulatory power over every employee who, as an incidence to his regular employment, might on some remote occasions be called upon to do or perform some act which did affect safety of operation. By the same token it is difficult to believe that Congress, by Section 13 (b) (1) of the Fair Labor Standards Act intended to exclude from its benefits every employee who might spend an unsubstantial part of his time doing exempt work. The two Acts, intended to correct two different evils, have two different purposes; one has as its purpose the promotion of safe operations whereas the other is designed to correct sub-standard working conditions. Safety of operation would not be promoted by extending the power of the Commission to cover the activities in which these Respondents were engaged, but sub-standard working conditions will result if the Respondents are excluded from

the benefits of the Act and it is here submitted that the exemption was never intended to apply unless the employee comes squarely within the terms of its provisions. In *Phillips* v. *Walling*, 324 U. S. 490, 65 Sup. Ct. 807, this Court said:

> "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and frustrate the announced will of the people."

In other instances similar to the situation here presented, the Courts have consistently adhered to this policy and refused to recognize an exemption where the major part of the employee's work was non-exempt. *Walling* v. *West Ky. Coal Co.*, 153 F. 2d 582; *Walling* v. *Griffin Cartage Co.*, 153 F. 2d 587; *Walling* v. *Morris*, 155 F. 832; *Fletcher* v. *Grinnel Bros.*, 150 F. 2d 337.[11]

No reference is made herein to the Legislative history of the Act, because that subject has been fully covered by the brief which is being submitted by the Solicitor General *amicus curiae*. However, it would appear from a study of such Legislative history that it was not the intent of Congress to include within the exemption provisions of the Act employees who rendered services similar to those rendered by the within Respondents.

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11. The exemption has been held not to apply; where a checker occasionally assisted a loader in placing freight in a truck; *McKeown* v. *Southern California Freight Forwarders*, 52 Fed. Sup. 331; where the exempt work of a night watchman was an incident of his employment; *Green* v. *Riss & Co.*, 49 Fed. Sup. 648; where a painter occasionally worked as a mechanics helper; *Bumpus* v. *Continental Baking Co.*, 1 WH Cases 920; where the major part of the work of a seaman was non-maritime; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971; Certirari denied, 326 U. S. 722, 66 Sup. Ct. 27.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed, and a reasonable sum should be awarded the Respondents for legal services on this appeal.

Dated: October 15, 1946.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1946.

Pyramid Motor Freight Corporation, Petitioner, v. Murray Ispass, Max Granofsky, Harry Brownstein, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This case presents two issues:

I. Was it reversible error for the Circuit Court of Appeals to deny petitioner's motion to dismiss the appeal, made on the ground that the appeal had not been docketed and the transcript of record had not been filed within the time specified in Rule 73 (g) of the Federal Rules of Civil Procedure? We hold that it was not.

II. Under the principles we have stated in the companion case of *Levinson* v. *Spector Motor Service*, — U. S. —, was the Circuit Court of Appeals justified in remanding the present case to the District Court for entry of a judgment under the Fair Labor Standards Act, in favor of all of the respondents except Shapiro? We hold that the case should be remanded, but with directions to proceed in accordance with the opinion of this Court in this case and the *Levinson* case. This will include a direction to the District Court to determine whether or not the activities of each respondent consisted, wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC-2*, 28 M. C. C. 125, 133–134, as that of a "loader" of freight for an interstate common carrier by motor vehicle, and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[1]

[1] See *Levinson* v. *Spector Motor Service*, *ante*, p. —, note 2.

This action was begun in 1942 in the City Court of the City of New York, pursuant to § 16 (b) of the Fair Labor Standards Act.[2] It sought to recover unpaid overtime compensation for services rendered to the petitioner by each of six of the eight respondents as "a delivery clerk and 'push-boy'," during various periods between October 24, 1938, and September 20, 1941, computed in accordance with § 7 of the Fair Labor Standards Act,[3] together with interest, liquidated damages and an attorney's fee. The case was removed by the petitioner to the United States District Court for the Southern District of New York. The other two respondents there joined in the complaint on like grounds. The petitioner answered that it was an interstate common carrier of freight by motor vehicle; that the labor performed by each of the respondents "consisted primarily of that of [a] driver's helper and of [a] loader;" that, with respect to them, the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to § 204 of the Motor Carrier Act, 1935, and that, by virtue of § 13 (b) (1) of the Fair Labor Standards Act,[4] § 7 of that Act did not apply to the services of the respondents. The case was submitted to the court upon an agreed statement of facts.[5]

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[2] See *Levinson* v. *Spector Motor Service*, note 6.

[3] See *Levinson* v. *Spector Motor Service*, note 5.

[4] See *Levinson* v. *Spector Motor Service*, note 4.

[5] This included the following description of the work of the respondents as employees of the petitioner:

"Item 3. As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown, helpers rode on the vehicles with the drivers to the 38th Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. *As the downtown helper pushed the freight packages over the tailboards they were received by*

On November 29, 1943, the District Court rendered an opinion in which it declined to determine the status of

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the plaintiffs [respondents], who then placed the freight packages in the subterminal building. Still later in the mornings the plaintiffs [respondents] then delivered the packages to various consignees in the Garment Center, generally using for that purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

"During those same days other northbound trucks after first stopping at the West 11th Street main terminal to change a driver and receive a downtown helper, by-passed the West 38th Street subterminal and parked first at one place and then another alongside the curbs in the Garment Center. *At those places the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs [respondents] then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.*

"Item 4. In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was 'picked up' for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: *Some of the freight packages would be picked up by the plaintiffs [respondents] at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs [respondents] themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs [respondents] would also at the same time so load the vehicles.*

"Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs [respondents] brought the packages by hand or by hand truck. The part which the plaintiffs [respondents] took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

"Item 5. As to all the plaintiffs [respondents] other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another

the respondents but held the case "open for further action" in order to give the respondents an opportunity to present that question to the Interstate Commerce Commission. 54 F. Supp. 565, 569. Pursuant to respondents' statement that they would not so apply to the Commission and pursuant to their motion requesting a final disposition of the case, the court, on February 14, 1945, dismissed the complaint "without prejudice."[6] 59 F. Supp. 341. After considerable delay in the filing of the record on appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of dismissal as to the respondent Shapiro on the ground that "he is a 'helper' within the Commission's ruling in 28 M. C. C. at pp. 135, 136." 152 F. 2d 619, 622. As to the other respondents, it reversed the judgment with costs and remanded the cause "for entry of judgment in their favor and for allowance of an attorney's fee." *Id.* at 622. The judgment as to Shapiro has not been questioned and is not before us.

Because of its importance in the interpretation of the Motor Carrier Act and the Fair Labor Standards Act, we granted certiorari, — U. S. —, and the case was argued immediately following the *Levinson* case. A brief on behalf of the Administrator of the Wage and Hour Division,

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in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal." (Italics supplied.)

[6] The order of dismissal appearing in the record was as follows:

"Ordered that the complaint be and the same hereby is dismissed and that judgment be entered abating and dismissing said action, without prejudice to the rights of plaintiffs [respondents], or any one of them, to bring other actions or proceedings for the establishment of their respective claims, either administratively or at an appropriate time, by action in this court or other proper tribunal."

United States Department of Labor, as *amicus curiae*, was filed jointly in this case and in the *Levinson* case, supporting the position of the respondents.[7]

I.

Notice of appeal, dated March 29, 1945, was filed by the respondents in the District Court April 2, 1945. In spite of the applicable provisions of Rule 73 (g) of the Federal Rules of Civil Procedure,[8] respondents sought

[7] See also, *Walling* v. *Comet Carriers*, 57 F. Supp. 1018, 151 F. 2d 107, 109; cert. granted, 326 U. S. 716; writ of certiorari dismissed on motion of counsel for petitioner Comet Carriers, 328 U. S. 819. That case, also in the Second Circuit, related to "four motor truck drivers, four drivers' helpers and two hand truckers or pushers" employed by Comet Carriers in the transportation of goods between manufacturers and contractors mostly on intrastate trips within or near the New York City Garment Center. As to the hand truckers or pushers, the District Court said: "they are not employed on motor vehicles nor do their functions as employees affect or relate to the safety of operation of the motor vehicles in interstate commerce." 57 F. Supp. 1018, 1023. The Circuit Court of Appeals discussed only the drivers and drivers' helpers. As to them it said:

"Proof that two employees worked only three hours a week in interstate transportation and that two employees made 'some' and 'occasional' deliveries to the warehouses of chain stores and worked the remaining time in the production of goods for commerce does not satisfy the requirement that the amount of time during which they are engaged in interstate commerce be substantial." 151 F. 2d 107, 111.

[8] "RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

"(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without

from the District Court no extension of time within which to docket their appeal or file a transcript of the record. On July 20, 1945, more than 90 days from the date of the first notice of appeal, respondents, pursuant to motion supported by affidavit, secured from Circuit Judge Augustus N. Hand an order extending to September 1, 1945, the time within which to serve and file their record on appeal. On that date, the transcript of record was filed. The petitioner promptly moved to dismiss the appeal under Rule 73 (a) of the Federal Rules of Civil Procedure,[*] questioning especially the right of a single member of that court to make the order of July 20. This motion was denied October 10, 1945, Circuit Judges Learned Hand, Swan and Clark speaking for the court. The motion was renewed at the hearing on the merits of the appeal and, on December 28, 1945, was denied again, Circuit Judges Learned Hand, Swan and Frank speaking for the court. 152 F. 2d 619. The issue was raised properly and fully presented here.

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motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." 308 U. S. 752, 28 U. S. C. following § 723 (c).

[*] "RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

"(a) HOW TAKEN. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal." 308 U. S. 745, 28 U. S. C. following § 723 (c).

The authority of a Judge of the Circuit Court of Appeals for the Second Circuit to extend the time for filing the record on appeal appears to be supported by Rule 15 of that court.[10] That Rule, however, was not discussed by counsel and we sustain the action taken by the Circuit

[10] Rule 15, U. S. C. C. A., Second Circuit.

"DOCKETING CASES.

"1. In an appeal in a civil action the appellant shall docket the action and file the record in this court within forty days after filing the notice of appeal with the District Court, or within any added time granted by the district judge within forty days after the filing of the notice of appeal, but in no case later than ninety days after such filing (Rule 73 [g]). . . . *If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless this court so orders, or a judge thereof if the court is not sitting.*

"2. This Court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision 1 hereof, except upon a showing by affidavits, or otherwise as the Court may order, (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal and (c) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

"3. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this Court, in which event it shall stand for argument, or may have the action docketed and dismissed by the Clerk of this Court upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that four days' notice in writing has been served on the appellant or his attorney that application will be made to the Clerk of this Court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the Court, and upon a showing similar to that required under subdivision 2 hereof." (Italics supplied.) 11 U. S. Sup. Ct. Rep. Digest, L. Ed., Supp. No. 4, p. 55.

Court of Appeals under authority of Rule 73 (a), even without reference to its own Rule 15.

The principal argument against the final action of the Circuit Court of Appeals on this motion is based upon the following statement in that court's opinion: "In the case at bar there was no abuse of discretion in extending the time, *despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment.*" (Italics supplied.) 152 F. 2d 619, 621. It is urged that this shows that the court based its refusal to dismiss the appeal on the substantiality of the question to be presented on the merits of the appeal, rather than on the substantiality of the excuses for the delay in filing the record.

We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration under Rule 73 (a), in connection with all the other circumstances before it. Rule 73 (a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no reason to question the discretion exercised in this case as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83; *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469; *Burke* v. *Canfield*, 111 F. 2d 526; *United States* v. *Gallagher*, 151 F. 2d 556.

Accordingly, we sustain the denial of the motion to dismiss the appeal under Rule 73 (a).

II.

On the merits, the question is whether or not the Circuit Court of Appeals was justified in remanding this case with instructions to enter a judgment under the Fair Labor Standards Act in favor of all of the respondents except

Shapiro. We hold that the cause should be remanded but that the order of remand should be modified. This case was tried, without a jury, entirely upon an agreed statement of facts and a pre-trial agreement between the parties, approved by the District Court, settling the issues to be determined. For the sake of clarity, we have proceeded on the same basis and have treated the case as though, upon remand of it to the District Court, that court will proceed upon the same record. This, however, should not be interpreted as necessarily restricting that court to that record if, for good cause, that court should find it advisable to retry the case *de novo*.[11]

Under the agreed statement there was no question but that the Fair Labor Standards Act applied to each respondent provided only that he was not found to have been excluded from the overtime pay requirements of that Act by § 13 (b) (1) because of being an "employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1). There thus will remain to be determined by the District Court the question whether the activities of the respective respondents

[11] The District Court, in its order of February 14, 1945, described the basis on which the case had been tried as follows:

". . . on the 3rd day of May, 1943, and the parties hereto having duly appeared by their respective attorneys, and submitted to the Court, in lieu of the offering of proof, an agreed statement of facts setting forth the issues framed by the complaint, and the Court, upon the consent of the attorneys for the respective parties, having thereupon made and entered an order herein on the said 3rd day of May, 1943, wherein and whereby the said agreed statement of facts which were submitted by the attorneys for the respective parties, as aforesaid, was set forth as the issues framed by the complaint and answer, and the said action having been submitted to the Court for its determination upon the said agreed statement of facts and order hereinbefore mentioned and referred to, ..."

consisted, either wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC–2*, 28 M. C. C. 125, 133–134, as that of a "loader," and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[12]

It will remain for the District Court to apply the facts found by it as to the activities of the respective respondents to the classifications of work that have been made by the Interstate Commerce Commission, defining what comes within the jurisdiction of the Commission under § 204 of the Motor Carrier Act. The Commission has defined its jurisdiction, both affirmatively and negatively, as follows:

> ". . . we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above [mechanics, loaders and helpers], and . . . we have no such power over any other classes of employees, except drivers." *Ex parte No. MC–2*, 28 M. C. C. 125, 139.[13]

Under these circumstances, there is no occasion for us to refer to the Commission any question presented in this case nor to suspend the long delayed final judgment pending further findings by the Commission. The Commission has done its work. The District Court must determine simply whether or not the respective employees who seek to recover overtime compensation under § 7 are excluded from the benefits of that Section because they are within the above classification. The special knowledge and experience required to determine what classi-

[12] See *Levinson* v. *Spector Motor Service*, note 2.

[13] The findings of fact referred to by the Commission, insofar as they relate to loaders, are those quoted in the text of *Levinson* v. *Spector Motor Service*, at note 17.

fications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process.

The District Court, in applying § 204 of the Motor Carrier Act to respondents, will determine whether or not the activities of each respondent, either as a whole or in substantial part, come within the Commission's definition of the work of a "loader." In determining whether the activities, or any substantial part of the activities, of an individual come within those of such a "loader," the District Court shall not be concluded by the name which may have been given to his position or to the work that he does, nor shall the District Court be required to find that any specific part of his time in any given week must have been spent in those activities. The District Court shall give particular attention to whether or not the activities of the respective respondents included that kind of "loading" which is held by the Commission to affect safety of operation. In contrast to the loading activities in the *Levinson* case, the mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of "loading" which is described by the Commission and which, in its opinion, affects safety of operation. See also, *McKeown v. Southern California Freight Forwarders*, 49 F. Supp. 543. Except insofar as the Commission has found that the activities of drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation, it has disclaimed its power to establish qualifications or maximum hours of service under § 204 of the Motor Carrier Act.

If none of the alleged "loading" activities of the respective respondents, during the periods at issue, come within the kind of activities which, according to the Commission, affect the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of § 7 of the Fair Labor Standards Act. On the other hand, if the whole or a substantial part of such alleged "loading" activities of the respective respondents, during the periods at issue, do come within the kind of activities which, according to the Commission, affect such safety of operation, then those respondents who were engaged in such activities are excluded from the benefits of such § 7. If some, but less than a substantial part, of such activities of the respective respondents, during some or all of the periods at issue, come within the kind of activities which, according to the Commission, affect such safety of operation, then the right of those respondents who were engaged in such activities to receive the benefits of § 7 of the Fair Labor Standards Act does not come within the precise issue determined in the *Levinson* case and this Court reserves its decision as to the power of the Commission to establish qualifications and maximum hours of service with respect to them and, consequently, reserves its decision as to their right to receive the benefits of § 7 of the Fair Labor Standards Act.

For these reasons, the judgment of the Circuit Court of Appeals is vacated insofar as it relates to the respondents other than Shapiro, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.